IN THE

SUPREME COURT OF THE UNITED STATES.

LEONIDAS M. LAWSON, ET AL.,
Petitioners,

v.

UNITED STATES MINING COMPANY, A CORPORATION,
Respondent.

APPLICATION FOR WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

Before replying to the specific grounds urged by the petitioner for the issuance of the writ of certiorari in this case, a more complete statement of the case is deemed necessary.

STATEMENT OF CASE.

The bill of complaint alleges in substance that the respondent is the owner and in the possession of the Jordan Extension, the Northern Light, the Fairview, and the Grizzly mining claims, situated in West Mountain Mining District, Salt Lake County, Utah; that beneath the surface boundaries of these claims, extended downward vertically,

there is a vein or lode, or veins and lodes, of mineral bearing rock carrying valuable metals, the property of the plaintiff; that the four claims are contiguous and adjacent to one another, and to other mining claims owned, occupied and worked by the plaintiff as a group forming one property for mining purposes; that defendants and each of them assert and claim an interest in said premises and the ores and minerals therein, adverse to plaintiff, which said claims are false and untrue, and unfounded in fact, and are a cloud upon the title and possession of plaintiff; that in furtherance of said alleged claim of interest the defendants from time to time have wrongfully and unlawfully, by means of secret underground works and excavations under and beneath the surface of the Jordan Extension, Northern Light and Grizzly mining claims, mined and converted to their own use large and valuable quantities of ores, etc., and will continue so to do unless restrained.

The bill further alleges that the defendants are in possession of a certain claim known as the Kempton, and that they pretend that the ores beneath the surface of the three claims last named are part of the vein belonging to the Kempton claim, and that as the owners of the Kempton, having the apex of said vein therein, they claim the right to enter and extract ores from beneath the surface of the said four claims, including the Northern Light.

But the bill alleges to the contrary that the apex of the vein or lode in which the ores beneath the surface of the said four claims are found is within the Jordan mining claim, Lot 64, and the Mountain Gem mining claim, Lot

475, of which claims the respondent is the owner, and that if there is any vein in the Kempton dipping or in any wise extending to or under the four claims first named that such vein does not apex in the Kempton or belong thereto, but the same is a part of and belongs to the said Jordan and Mountain Gem lodes.

The answer of the petitioners to this bill denies the material allegations of the bill, alleges that petitioners are in possession of and working the said Kempton mining claim, and that the lode in the said four first named claims of the respondent has its top or apex in said Kempton, and belongs to and is the property of the petitioners by virtue of the extralateral rights of the vein or lode claimed to have its top or apex in said Kempton claim.

It is further affirmatively alleged that a part of these ore bodies belong to a vein whose top or apex is found within the surface boundaries of the Ashland lode mining claim, which is possessed and worked by the defendants. (Record pages 1-9, 16-26, 45-46.)

Upon the trial of the case the testimony, among other things, showed that in 1873-4 the owners of the Kempton were working at or near the surface, where the ore outcropped; that at that time the owners of the Kempton had worked to a depth of about one hundred feet, which carried them to a point at or near the northerly side line of the Kempton claim; that after that time some work had been done by the predecessors in interest of the defendants, through what is called the Neptune Tunnel, but the extent of the work does not appear. (Record pages 170-3.)

There was also testimony that one Heber McNeil

worked in the Kempton claim in November, 1884, and thereafter for about four years, off and on; that he commenced work upon the surface between the Kempton incline and the old Neptune incline, and mined there from along in June until the snow drove them from the surface in the fall; that he went to work again in July, 1898, and had worked there ever since, except a month and a half. (Record page 290.) During the latter period he worked for a man named Sampson, and after Sampson quit and Colonel Wall, one of the defendants, commenced, he worked under Wall. (Record page 293.)

We think this is all the evidence offered on the part of the petitioners tending to show the character of the occupancy of the premises or any of the ore bodies in controversy.

On the part of the respondent testimony was given to the effect that considerable work had been done by Sampson and others during the last three years, a portion of it having been done by Colonel Wall during the past year, and that this latter work embraced nearly all, if not all, of the work under the Northern Light and Grizzly. Prior to this work done by Sampson and others no work had been done under any of these claims for many years. (Record pages 105-6.) This testimony was given by Mr. Holden, and on cross examination (Record page 370) he testified that it was very seldom anybody worked there; that a good deal of ore had been taken from the surface and an old dump was removed; that no work had been done in the Kempton with ["without" in record, but the context shows witness said or intended to say "with"] the con-

sent of the witness for eighteen years in the lower workings. No suit had been brought by the United States Mining Company or its predecessors. If they had ever resumed work there to any appreciable extent, the witness adds, he would have stopped them, as he did stop them as soon as he knew they were working in that country.

On direct the same witness testified (Record pages 106-108) that the Neptune Tunnel was located by the owners of the Neptune in 1871 and the Neptune subsequently became the Kempton; that the plaintiff company and its predecessors had been in the exclusive possession of this tunnel since 1884. It was abandoned and the plaintiff pushed it under another claim, called the Excelsior, and the Mountain Gem and Jordan. The tunnel site had not been patented, but the mouth of it was covered at the surface by plaintiff's claims. The witness could not say when it was abandoned, but he had been in possession of it from 1884 down to the present time; that the underground workings (of the Kempton) were not made through this Neptune Tunnel, but nearly all the workings shown on the map and the old workings were made through three incline shafts; that Colonel Wall had been using the tunnel for about a year in his operations on the Kempton mine under a stipulation between the attorneys of the parties. This tunnel connects with the underground workings of the Kempton mine and has been connected for quite a number of years.

Further on the witness testified (Record pages 109-10) that the title to the Neptune Tunnel was in litigation at that time between the plaintiff and the Kempton Com-

pany, and both parties were enjoined from using it pending the litigation.

The same witness further testified on direct (Record pages 110-112) that under the Fairview mining claim there is a large ore body near station 876, which has never been reached by the defendants or any of them; that the workings which reach the ore body are those of the plaintiff company; that vertically beneath the surface of the Northern Light there is found a portion of this same ore body which has never been reached by any of the workings of the defendant; that vertically beneath the surface of the Jordan Extension there are two or more large ore bodies which have never been reached by the workings of the defendants; that under the Grizzly there is an ore body which has been opened since the suit was commenced, by workings of the defendants, which workings have developed ore unknown at the time of the commencement of the action; that vertically underneath the Grizzly there are ore bodies which have never been reached by any of the workings of the defendant; that the defendant Wall and his associates first commenced work under the surface of any of the claims less than a year ago and that he (witness) started suit as soon as he knew they were under the vertical boundaries of the claims.

It will be seen from this testimony that whatever work was done by the defendants or their predecessors up to within a year prior to the beginning of this suit was of the most fitful character. They were never in possession of any of the ore bodies underneath the first named four claims of the complainant. Whatever they did underneath

the surface of any of these claims was simply in the nature of repeated trespasses. Their possession at most did not extend beyond the excavations which they made. In addition to this, although they claimed the ore bodies underneath the Fairview mining claim, the evidence shows conclusively that their workings did not extend to them. (See testimony of Mr. Holden, Record pages 110-11.) The original bill of complaint alleged that the defendants (petitioners here) had entered beneath the surface of the Jordan Extension, the Northern Light, the Grizzly and the Fairview mining claims and extracted and removed and converted to their own use large quantities of ore, etc. The proof, however, having shown that the defendants had not entered beneath the surface of the Fairview claim, on motion of complainants, and in order to conform the pleadings to the proof, the court permitted the bill to be amended by striking out the language referring to the Fairview mining claim. (Record page 115.) The patent of the United States for the Northern Light mining claim issued to the predecessor in interest of the complainant bears date May 15, 1875. (Record page 46.) The patent of the Fairview mining claim bears date February 23, 1875, (Record page 52) and that of the Jordan Extension mining claim bears date February 8, 1896. (Record page 55.) The Grizzly mining claim, at the time of the trial, had not been patented, but it was located on August 3, 1869, by the predecessors in title of the complainant. (Record page 63.) The Old Jordan lode mining claim, Lot No. 64, was located September 17, 1863. (Record pages 321-322. Erroneously printed at page 322 as 1873.) The

Mountain Gem mining claim, Lot 475, was located August 20, 1864. (Record page 329.) There was introduced in evidence an exemplified copy of the various papers upon which the patent of the Old Jordan, Lot No. 64, was granted, which showed that the patent was granted upon the location notice hereinbefore referred to (Record pages 321-22) and there was likewise introduced in evidence an exemplified copy of the papers upon which the patent to the Mountain Gem mining claim, Lot No. 475, was issued, showing that the patent to that claim was based upon the location notice heretofore described. (Record page 329.) Title deeds from the original locators and patentees were introduced in evidence showing that the title to all of such claims had become vested in the complainant prior to the commencement of the action. (Record pages 42, 46, 80, 320-332.)

The evidence further showed that the petitioners' mining claims were patented upon the dates following:

The Ashland, September 27, 1875, (Record page 115) and

The Kempton, February 23, 1875. (Record page 137.)

It will thus be seen that although the patents for the Kempton and Ashland mining claims antedated the patents for the Old Jordan, Lot No. 64, and Mountain Gem, Lot No. 475, mining claims, that the locations of the two last named claims upon which the patents were issued antedated many years the patents for the Kempton and Ashland claims.

And it is alleged in the answer of petitioners that the Kempton claim was located in 1871 (Record page 30), so that it affirmatively appears that the location of the Old

Jordan and Mountain Gem not only antedated the patent, but also the location, of the Kempton. There is no evidence whatever as to the date of the location of the Ashland.

It is therefore shown by the evidence that the plaintiff, prior to and at the time of trial, had a perfect legal title to the Jordan Extension, Northern Light, Grizzly, Fairview, Old Jordan and Mountain Gem mining claims. In addition to this, as will be seen by an inspection of the maps, the plaintiff had extensive underground workings in each of these claims, and thereby it not only had possession of the surface of its claims, but of large and extensive underground areas, including vast bodies of ore, as well.

The country where these mines are located is locally known as Bingham Canyon, and consists geologically of beds of limestone lying between beds of quartzite. These beds, speaking generally, have an east and west strike and dip to the north. The two principal beds are followed practically straight across the district, and extend for a total distance where they are known, worked and identified, of about three miles. The lower belt of limestone is the one upon which the Jordan and Mountain Gem are located. The upper belt of limestone is substantially parallel with it and about three hundred feet to the north. (Record pages 338-9.)

The Ashland claim is located upon a fissure called the Ashland fissure, which cuts through these alternating beds of lime and quartzite. It varies in size, and in the quartzite runs from a mere seam to two and one-half or three

feet in width. (Record page 217.) It is wider in the limestone where it cuts through these pre-existing ore bodies. (Record pages 425, 426.)

Extending through and lying substantially parallel with the Old Jordan, the Mountain Gem and the Kempton mining claims is the belt of limestone which complainants claim is the lode in which the various ore bodies in dispute are found. This limestone belt can be followed practically across the entire mining district, starting from the Salt Lake Valley on the east and terminating in the heart of the Oquirrh Mountains on the west, a total distance, where it is known, identified and worked, of about three miles, and that out of this belt of limestone nearly eighty per cent of all the ores shipped from the entire district in its nearly forty years of existence has come. (Record pages 338-9.)

The dip of this limestone belt is northerly and varies from fifteen degrees to possibly forty degrees from the horizontal. (Record page 339.) The underlying foot wall of this lime belt is quartzite throughout its entire distance; the hanging wall is quartzite for nearly the entire distance, there being occasional intrusions of porphyry. (Record page 339.) The width of this belt varies from one hundred to two hundred feet. (Record pages 341, 449, 434.) This lime belt was originally horizontal, but in the process of mountain building has been tilted up and in the tilting has been cracked, crushed, broken and shattered within itself, and has left a mass of entwining and interlacing fissures running across the lime, running with the lime and running in other directions, there being many thou-

sands of them. Great areas have been wholly replaced with quartz, with sulphides, with lead, copper, iron and zinc. Other sections have been metamorphosed until the entire bed structure has disappeared and great regions of it have been silicified. It is with great difficulty that the original formation can be found. It is shown for a short distance in some places. In some places the limestone is crushed into small fragments. Sometimes it may be even sand, but is usually larger. (Record 339-40. See also Record page 453, 425-6.) Through this belt of limestone thus profoundly crushed, broken and altered vast bodies of ore are found in numerous places running either straight or diagonally across from quartzite hanging to quartzite foot wall, and bounded by such walls. One such ore tracing is found in what is called the Black Stope, about six thousand feet easterly from the ground in dispute. Here the ore and quartz extend from the hanging to the foot wall, straight across the vein, with no lime left or shown. (Record page 341.) Coming on to the west towards the ground in dispute, no less than twelve distinct tracings of ore are actually met from foot wall to hanging wall, extending for this six thousand feet in distance to the very ground in dispute and a few hundred feet apart. (Record pages 341-8.) Not only can the ore be thus traced at these various places across the vein, but it can be followed from the Black Stope continuously along the length and within the lime belt, with the exception of less than four hundred feet, where there has been no development work, to and including the ground in dispute, a total distance of more than six thousand feet. (Record 345-6,

391-2, 452-3, 429-30.) These ore bodies which are thus traced continuously, both across and along this limestone belt, are wholly within the lime belt and never out of it. (Record page 343, 395.)

The testimony further shows that one may reasonably expect to encounter ore anywhere within the limits of this lime belt, and that the only proper method of prospecting the same is to drive and crosscut it in every direction to the quartzite limits, just as a miner would prospect a great fissure vein, never ceasing his development work until he had reached the walls of the fissure. (Record pages 439-40.)

This limestone belt which constitutes the lode, at its apex enters the surface ground of the Old Jordan lode across its northeasterly end line and runs on its strike and at its apex southwesterly in the claim and between and nearly parallel to the side lines thereof, within ground belonging to and not excepted therefrom for a distance of over 1550 feet. It then passes across the northeasterly end line of the Mountain Gem and continues between and nearly parallel to the side lines throughout the length of that claim. The exact course and exact relations of the lode at its apex to the Old Jordan, Mountain Gem and Kempton claims cannot be determined from a mere reading of the record, but can only be determined by an inspection of the map upon which it is shown, in connection with the record. On complainant's surface map, Exhibit "T," the boundary of the lime belt is shown by a blue color, placed thereon by witnesses who identified it, and who testified that it was correctly shown. (Record pages

344, 449, 451, 427.) It will be seen from an inspection of this map that the hanging wall side of the lime belt enters across the southeasterly side line of the Kempton between posts 4 and 5 and leaves the southwesterly side line of the Kempton between posts 2 and 3, within about twenty-five feet of post 2.

The yellow color on Exhibit "T" indicates quartzite and the green color indicates porphyry (Record page 344) and it will be seen that the westerly end of the Kempton is wholly in the porphyry. A reduced map of the complainant's Exhibit "T" is hereunto annexed.

[In this connection we call attention to the fact that the map attached to the petition herein does not show the Mountain Gem Mining claim and does not contain the other features shown upon our Exhibit "T" as above stated.]

In the opinion of the Circuit Court of Appeals, which is printed in respondent's petition, beginning at page 17, the apex of this lode is thus described:

> "The apex of a stratum of limestone, the strike of which is in a southwesterly and northeasterly direction, is longitudinally bisected or divided by the Old Jordan, Mountain Gem and Kempton. The southerly side lines of the Kempton, as patented, are in part coincident with the northerly side lines of the Old Jordan and Mountain Gem, as patented, and the greater part of the width of the apex of the limestone is south of the lines so dividing the patented ground and is within the surface boundaries of the Old Jordan and Mountain Gem.' "

This statement of the court is borne out by the record and map.

ARGUMENT AND AUTHORITIES.

We apprehend that it is neither necessary nor proper at this time to enter upon a discussion of the merits of the case generally, and will therefore confine what we have to say to the grounds stated in the petition herein as the basis for petitioner's application for the writ of certiorari.

These grounds are stated in the petition as follows:

"First: 'In the interests of jurisprudence and uniformity of decision' "between this court and the said Circuit Court of Appeals, there being a substantial conflict of decision on a vital and controlling matter of law involved in this cause, between the said Circuit Court of Appeals and this court, the final authoritative determination of which question of law is important to all persons who hold patented titles to lode mining claims from the United States, under its laws."

"Second: Because there is in like manner a conflict of decision between the said Circuit Court of Appeals and the Supreme Court of the State of Utah on an important, controlling and decisive question of law involved in this case, and it is important to the general stability of patented titles to mining claims in the United States, and in the said Eighth Judicial Circuit, that the law shall be uniformly established in harmony with the previous decision of this court, and of the Supreme Court of Utah in the like case."

"Third: There is a conflict of decision between the Supreme Court of Utah and the said Circuit Court of Appeals, in respect of the construction and application of

Section 3511 of the Revised Statutes of Utah of 1898, whereby in this cause the right of trial by jury, though demanded by your petitioners, was denied them." See pages 1 and 2 of the petition.

At page 11 of the petition an additional ground is stated, or question raised. We quote:

"3.—Is this though nominally a suit in equity to quiet title, not a suit at common law within the meaning of the Seventh Amendment of the Constitution of the United States, and whether your petitioners have not been deprived of the right of trial by jury in this case, which is provided for and preserved by said Seventh Amendment?"

We will take these several matters up in inverse order. Both in the Circuit Court and in the Circuit Court of Appeals for the Eighth Circuit, it was contended by counsel for petitioner, and we doubt not it will be also here contended, that a bill to quiet title could not be entertained until complainant's title to and right to possession of the lode in controversy had been previously established by an action at law.

To this we answer, that where the owner of lands is in the possession thereof, and one out of possession asserts an adverse claim or interest therein, the owner, under the laws of the State of Utah, is not required to wait until his title has been settled by an action at law brought by the person asserting such adverse estate or interest. Section 3511 of the Revised Statutes of Utah of 1898 is as follows:

"An action may be brought by any person against

> another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The Federal Courts will give effect to the enlarged equitable relief provided for by this act in all cases where the land is vacant; where neither the owner nor the person asserting the adverse claim is in possession, and in all cases where the owner is in the possession of the lands. In the case of Holland v. Challen, 110 U. S., page 16, (which was a bill in equity to quiet title), it was contended by counsel for the defendant that the bill was defective in that, the title of the plaintiff to the property had not been by prior proceedings judicially adjudged to be valid, and that the plaintiff was not in possession of the property. The case involved lands situated in the State of Nebraska. A statute of that State provided as follows:

> "That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person, or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate."

This court, speaking through Mr. Justice Field, said, at page 18 *et seq.*:

> "The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings, not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litiga-

> tion of an unsuccessful claim by the same party, but also to prevent future litigation . respecting the property, by removing existing causes of controversy as to its title; and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie."

And after commenting upon the facts which were essential to the maintenance of a bill of peace or a bill *quia timet* (under the chancery practice unmodified by statute), proceeds as follows, at page 20 *et seq.*:

> "The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain a suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in

the bill as unoccupied, wild and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. * * * An action of ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several States, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the States should not be enforced by the Federal Courts, when the controversy to which it may give rise is between citizens of different States."

And at page 24:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity. * * * It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

We also cite the case of Reynolds v. Crawfordsville

First National Bank, 112 U. S., page 405. The case of Whitehead, Trustee, v. Shattuck, 138 U. S., page 146, decides that under statutory provisions such as have been above quoted, a bill to quiet title could not be maintained in the Federal Courts where the plaintiff was out of possession and the defendant in possession, but it in no way calls in question the correctness of the decisions in the case of Holland v. Challen and Reynolds v. The Bank, *supra*. See also the following cases:

Prentice v. Duluth Storage & Forwarding Company, 58 Fed. Rep., 437;
Stark v. Starrs, 73 U. S., 402;
Gillis v. Downey, 85 Fed. Rep., 483;
Dahl v. Raunheim, 132 U. S. 260.

We invite attention also to the opinion of his Honor Judge Marshall, rendered in overruling the demurrer to the amended bill in this case, which will be found in the record, pages 13 to 16 inclusive.

In the case of Cowley v. Northern Pacific Railroad Company, 159 U. S., page 569, the Court, speaking through Mr. Justice Brown, said, at pages 582 and 583:

> "Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal courts may enforce on their equity or admiralty side precisely as they may enforce a new right of action given by statute upon their common law side."

And the cases of Holland v. Challen, and Reynolds v. The Bank, supra, are cited in support of the doctrine thus announced.

The case of the Boston & Montana Consolidated Copper & Silver Mining Company v. The Montana Ore Purchasing Company, 188 U. S., page 632, was cited by counsel for petitioner in the Court of Appeals, and it was insisted that it was thereby determined by this court that a bill to quiet title could not be entertained in the Federal courts until the complainant's title had been established by at least one successful trial at law.

The bill alleged that the defendants had unlawfully entered upon complainant's premises and had extracted from the same large quantities of valuable ores, and that they were then continuing mining and extracting ores from said premises and threatening to continue to do so unless enjoined by the court; that unless enjoined, the complainant would be driven to a multiplicity of suits, and would be compelled to rely to a great extent on the defendants, as to the amount and value of ore from time to time extracted; and then for the purpose, as stated in the bill, of showing the jurisdiction of the court over the matters set forth in the bill, allegations were made of the defense which the defendants intended to set up or which they relied upon. The bill was dismissed by the Circuit Court for want of jurisdiction, and the question of jurisdiction was certified to this court.

And it was held that the Federal question relied upon as conferring original jurisdiction on a Circuit Court of the United States, must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up or upon which they rely. And then, on

page 640, *et seq.*, the court, speaking through Mr. Justice Peckham, says:

> "It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the 'Rarus' and 'Johnstown' claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defense, however, but as establishing the complainant's right to have its title quieted.
>
> "*But it is plain that the suit is not in truth a suit to quiet title.* There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendant's title or to anticipate their defense to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal Court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion." * * *

"If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that aspect. There are two distinct kinds or classes of bills of peace, or bills to quiet title, the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction.

"This bill evidently would come under the second class of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law."

This we respectfully submit was obiter dictum. Moreover, the opinion makes no reference whatever to the cases of Holland v. Challen; Reynolds v. The Bank; Stark v. Stans, or Dalh v. Raunheim, above cited or to either of them.

It was further insisted by counsel for petitioner, in the Circuit Court and in the Court of Appeals, that the defendants were in possession of the property in controversy, and therefore, the complainant could not resort to the equity side of the court, inasmuch as it had a plain, speedy and adequate remedy at law.

In our statement of facts, we have referred to, and given in substance, all of the testimony bearing upon the

question of defendants' possession. It appears therefrom that many years prior to the commencement of this suit, the then owners of the "Kempton," or those claiming under them, had done some work on some of the ore bodies involved; that then for many years no work had been done by "Kempton" people until about three years prior to the commencement of the suit, when one Samson, claiming under the owners of the "Kempton," had done some work on ore beneath the "Jordan Extension;" that thereafter, and about one year prior to the filing of the bill, the defendant Wall, claiming under the owners of the "Kempton" as lessee, had resumed work, and that as soon thereafter as it was discovered by the plaintiff that the said Wall had so commenced work in the disputed territory, the suit was commenced. It also appears from the statement of facts that at the time the case was tried, there were ore bodies beneath the surface of the "Jordan Extension" which had not been reached at all by any work done by the defendants or any of their predecessors; and the same is true as to ore bodies beneath the surface of the "Northern Light" and the "Grizzly," and that as to the "Fairview," none of the workings of the defendants or any of their predecessors had reached that territory.

Our contention is that the defendants were, and each of them was, a mere trespasser at the time this bill was filed. That every entry made by the defendants, or their predecessors, was a separate and distinct trespass, that when the said Samson ceased his work and left the premises, for instance, his acts of trespass ceased, and the possession of the complainant was then undisturbed in any

way, until the defendant Wall re-entered as hereinbefore stated. It was shown by undisputed testimony that the complainant was the owner and in possession of the "Northern Light," the "Fairview," the "Grizzly," the "Jordan Extension," as well as the "Jordan," Lot 64, and "Mountain Gem" claims. The owner of the legal title being in possession of a part of a tract of land, is in contemplation of law, in possession of everything within its exterior boundaries, except as to such part only as he may have been actually ousted from; the legal title and possession of a part draws to it the possession of the whole, except to the extent that there may have been an actual adverse possession by some other party; the possession of an intruder, or one without title, or of one, even, who enters under color of title is not extended beyond his actual enclosure, or that of which he has taken actual, physical, possession, as against the true owner who is in possession of a part. The possession of a mere trespasser, or, even, of one entering under color of title, on a lode or vein, and who has engaged in the extraction of ore therefrom, cannot be extended beyond the point of his pick, the face of his drift, or other actual opening made by him, as against the true owner who is also in possession.

"Title to land draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual adverse possession; and while he is in actual possession of a part of the premises, he has constructive possession of the remainder, and can be ousted by a mere intruder only to the extent of the actual occupation of such intruder; and no entry by an intruder under

color of title to the whole tract can give him a constructive possession which would oust or supercede the constructive possession of the real owner."

Labory v. Orphan Asylum, 97 Cal. 270.

In Clark vs. Courtney, 5 Peters 319, it is said at 354-5:

"If a mere trespasser, without any claim or pretense of title, enters into lands, and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the later, but in such case the possession of the trespasser is bounded by his actual occupancy, and consequently the true owner is not disseized except as to the portion so occupied. But where a person enters into land, under a deed or title, his possession is construed to be coextensive with his deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed to be disseized to the extent of the boundaries of such deed or title. This, however, is subject to some qualifications. *For, if the true owner be, at the same time, in possession of a part of the land, claiming title to the whole then, his seisin extends by construction of law to all the land which is not in the actual possession and occupancy, by enclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain; both parties cannot be seized of the same land at the same time under different titles, and the law therefore adjudges the seisin of all, which is not in the actual occupancy of the adverse party, to him who has the better title.* This doctrine has been on several occasions recognized in this Court. In Green vs. Liter, 8th Cranch, the Court said the general rule is that if a man enters into land, having title, his seisin is not bounded by his occupancy but is held to be coextensive with his title; but if a man enters without title, his seisin is confined to his possession by metes and

> bounds. Therefore, the Court said, that as between two patentees in possession, claiming the same land under adverse titles, he who had the better legal title, was to be deemed in possession of all the land not included in the actual close of the other patentee."

So, also, the owner of a mining claim, in possession thereof, is in possession of the vein having its apex therein, although the vein in its downward course passes beyond the vertical side lines of the claim. See Montana Mining Company, Limited, v. St. Louis Mining & Milling Company of Montana, 102 Fed. Rep., page 43. And the Circuit Court of Appeals in the present case (see 134 Fed. Rep., 769), says, at page 772:

> "Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim, his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral rights granted by Congress, which is not in the actual possession of another holding adversely."

Citing a number of cases in support of the statement quoted.

Now, under the rule, or doctrine, of the foregoing cases, plaintiff, being entitled to the "Jordan Extension," "Northern Light," "Grizzly" and "Fairview," and being also in possession of the surface and portions of the underground works and ore bodies in such claims, is deemed to be in possession of every part of each of the claims, including all the ore bodies therein, except so far

only as the evidence might show the defendants had actually ousted the plaintiff. Here, we submit, there is nothing to show an ouster of the plaintiff by the defendants as to any part or portion of either of said claims, or of any ore body lying beneath them or either of them. As said in Clark v. Courtney, *supra*:

> "The law will not presume an ouster without some proof; and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseized, yet the latter is not bound to consider a mere act of trespass a dissezin."

We submit that under a state of facts, such as we have here to deal with, a suit in equity to quiet title is the only proper remedy. What action at law could we maintain? Counsel for petitioner may say, "Trespass." But the reply is, that one cannot maintain an action of trespass against one unless he is in possession of the property alleged to be trespassed upon. If, in this case, we have such possession as would enable us to maintain an action of trespass against these defendants, then we have the requisite possession to maintain our suit in equity to quiet title. That we have such possession as would entitle us to show trespass, is shown by the "Flagstaff" case, Mining Company v. Tarbet, 98 U. S. 462. That was an action, as stated by the court, in the nature of trespass *quare clausum fregit*, to recover damages for ore extracted from a lode in which both plaintiff and defendant were working. Damages were recovered in a large sum, and no question seems to have been made as to the right of the plaintiff to maintain the action on the ground that the defendant was in

possession. The question, however, was distinctly raised in Montana Mining Company v. St. Louis M. & M. Company, 102 Fed. Rep., page 430, which was an action in trespass brought by the St. Louis Company against the Montana Company to recover damages for ores extracted by the defendant from a portion of a lode claimed by the plaintiff. In the appellate court it was contended by the plaintiff in error that the lower court erred in refusing to instruct the jury as requested by plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain an action of trespass. The court says:

> "It is urged that the possession of the apex of the vein on the surface of the "St. Louis" claim was not the actual possession of the vein, as it extended beneath the surface of the "Nine-Hour" claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such possession is not constructive, but actual. But notwithstanding the plaintiff is in possession of the property in controversy, and therefore could maintain an action of trespass, yet such action would be entirely inadequate to redress the wrongs complained of."

It was suggested by counsel for petitioner in oral argument in the Circuit Court that our remedy would be trespass to try title. We answer, that no such action is provided for by the laws of Utah. One may recover damages in an action of trespass, of course, but such action does not, necessarily, involve the title at all. It involves, necessarily, only the present right of possession, and if the title *were* put in issue, it would necessarily determine only the title to the particular *locus* upon which the tres-

pass was committed. Trespass to try title, such as is recognized in Texas and some few other States, is unknown here.

We might, as suggested in the case of Clark v. Courtney, *supra*, elect to treat defendants' acts of trespass as a dissezin and proceed in ejectment, but, as there pointed out, we are not bound to treat ourselves as disseized. Should we do so, however, the remedy in such action would be as imperfect and inadequate as would the action of trespass. We could not truthfully allege in the complaint in ejectment that we had been ousted from either of the claims or from the lode therein, for the truth is, as appears from our own evidence, that we are in possession of each of those claims under the true, legal title thereto. We could not truthfully allege that we were ousted from any part thereof by the defendants beyond such part, such places, as defendants have actually trespassed upon. Should we in a complaint in ejectment allege that we have been ousted by defendants from either of the four claims, or that we had been ousted from the entire lode underlying these claims, the defendants could safely challenge us to show an ouster (even under our right to elect to consider ourselves disseized by the trespasses complained of), beyond the several openings made by them in or upon the ledge.

Were a complaint in ejectment to allege that the plaintiff was the owner of a given tract of land and in possession of a part thereof, and entitled to the possession of the whole, and that defendant had entered upon and ousted plaintiff from a portion of said tract, describing the

same, and that such unlawful entry was made by defendant under a claim of ownership and right of possession to the entire tract, with a prayer that plaintiff recover from defendant the entire tract, it would be an anomoly in pleading, and could not successfully stand the test of a demurrer.

Suppose, then, that we should elect to treat ourselves as disseised by defendants, so far as their drifts, levels and other openings extend, and bring ejectment for the recovery thereof and prevail therein, we would still be as far from obtaining the relief to which we are entitled, or any substantial relief, as we were at the beginning of the action.

We are not seeking by our bill in this case to have our title quieted to one or more empty chambers beneath the earth's surface from which the ore has been extracted. What we do seek is to have our title quieted to the ore bodies, underlying plaintiff's claims, which still remain in the ground. The title to all such ore bodies, valuable and extensive as they may be, would, notwithstanding the judgment in ejectment, still be clouded by defendants' unlawful assertion of claim thereto. We would after the judgment in ejectment, therefore, be driven to file a bill to quiet title to these remaining ore bodies. Is there any reason why a bill to quiet title thereto may not now be maintained as well as then?

The fact that one may have a remedy at law to redress a wrong will not preclude him from resorting to equity, unless the remedy at law be plain, speedy and adequate. The case of Boyce v. Grundy, 28 U. S., page 209,

was one where a bill in chancery was filed by the appellee, Felix Grundy, in the Circuit Court of West Tennessee against the appellants, who were executors of James Boyce, to enjoin a judgment at law which they had obtained against him for $4,700, and to rescind a contract made between James Boyce and Grundy by which Boyce sold and agreed to convey to Grundy a parcel of land, for which Grundy agreed to pay him $20,000, $2,000 of which were to be paid in hand, and the balance in yearly installments of $2,000. A deed of general warranty was by the written agreement of the parties to be made to the purchaser in four years. Grundy having failed to pay the amounts of the installments due January, 1820 and 1821, Boyce's executors commenced suit upon the contract for the first two installments, in the Circuit Court, and recovered judgment for the same, with interest. Afterward Grundy filed his bill, praying an injunction against the judgment at law and a recission of the contract, on the ground of fraudulent and false representations of Boyce in making the sale of the land. Mr. Justice Johnson, speaking for the court, says, at page 213:

> "This court has been often called upon to consider the 16th Section of the Judiciary Act of 1789, and as often, either expressly, or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity, on the subject of legal remedy. It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt adminstration, as the remedy in equity. In the case before us, although the defense of fraud might have been resorted to, and ought to

> have been sustained, in that particular suit, and I will add, would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate remedy, because it was a partial one. *The complainant would still have been left to renew the contest upon a series of suits;* and that probably after the death of witnesses."

See also:

> Watson v. Sutherland, 72 U. S., 74;
> Barrah v. Boyce, 67 Mich., 480.

We repeat that even if an action of ejectment or in trespass were open to us, the remedy in either action would be wholly inadequate to redress the wrong complained of. In the case of Empire State-Idaho Mining & Developing Company v. Bunker Hill & S. Mining & Concentrating Company, 121 Fed. Rep., page 973, it appears from the statement of facts that the Bunker Hill & Sullivan Mining & Concentrating Company brought its bill in equity against the appellant, the Empire State-Idaho Mining & Developing Company, to quiet title to the "Stemwinder" lode mining claim. The controversy related more particularly to extra-lateral rights. And it also appears from the statement that the bill alleged that the defendant claimed an interest adverse to the appellee in that portion of the vein which lies northerly and westerly of the northerly end line of the "Last Chance" claim, and that since September 1st, 1899, the appellant, by means of underground works, of which it has exclusive possession and control, has penetrated into that part of the underground vein so claimed to lie within the "Stemwinder" extra-lateral boundaries, and beyond the end line plane of the "Last Chance" northern boundary, and that said under-

ground vein, where so penetrated, contains large and valuable ore bodies, which the appellant is extracting and threatens to extract and remove unless enjoined. An injunction *pendente lite* was issued, and an appeal taken therefrom to the Circuit Court of Appeals of the Ninth Circuit. At pages 977 and 978, the court says:

> "Nor do we find that the court erred in overruling the demurrer on the ground that the appellee had an adequate remedy at law. It is true that by an action of ejectment the appellee might have determined the question of its title and right to the possession of that particular portion of the ledge upon which the appellant is alleged to have trespassed. But that relief is not all that the appellee is entitled to, if the averments of the bill are true. The suit is brought to determine the adverse claim of the appellant as to the whole of the ore body lying between the planes of the appellee's end lines projected beyond the extralateral rights of the 'Last Chance.' In answering an action of ejectment, the appellant would have been required to set up only its claim of right and title to the ore body at the particular spot where it had taken possession. The judgment would have left undetermined the question of its right to other portions thereof. That it in fact asserted adverse claims to other portions is shown by its answer in this suit, in which it set up ownership of several claims located along the lode northwestward from the 'Last Chance' claim, the extralateral rights of which would, but for the 'Stemwinder' location, include separate portions of the ore body the title to which the appellee seeks to quiet. No remedy would be adequate unless it quieted the title of the appellee to the whole subject of the controversy. As was said in Kilbourn v. Sutherland, 130 U. S., 506, 514, 'The jurisdiction in equity attaches unless the legal

> remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.' "

We would also invite attention to the opinion of his honor, Judge Marshall, in overruling the demurrer to the amended bill. The opinion will be found in the record, pages 13 to 16. We quote from the opinion, page 14:

> "The demurrer for the purposes of this hearing admits the facts well pleaded in the amended bill. The plaintiff is alleged to be in the possession of the premises in question. It, then, has no remedy in ejectment. In an action of trespass, the title would probably be drawn incidentally in question, but the right determined would be limited to the place trespassed on, and, indeed, the record would not show that the title was determined. In a case of this kind the remedy afforded in an action of trespass is not so adequate as that to be obtained in an equitable suit to quiet title. Mining Co. v. Mining Co, 5th Utah, 3; Ayers v. Bensley, 32 Cal., 620."

SECOND.

As we have already stated, petitioner claims that a writ of certiorari ought to issue for the reason, as alleged, that there is a conflict between the decision of the Supreme Court of Utah and that of the Circuit Court of Appeals, in this case, in respect of the construction and application of Section 3511 of the Revised Statutes of Utah, 1898, because, in this cause, the right of trial by jury, though demanded by petitioners, was denied them. And in support of this contention, the case of Park v. Wilkinson, 21 Utah, 279, is cited, on page 15 of the petition.

An examination of that case will, in our opinion, dis-

close that there is no conflict whatever. In the Utah case, page 282, the court says:

> "This action was brought under Sec. 3511 Rev. Stats., 1898, to determine the adverse claim and to quiet title to real property, by the plaintiff. The complaint alleges title in fee *and right of possession in the plaintiff*, and that defendants claim an interest therein, which is a cloud upon plaintiff's title."

It will be observed that the plaintiff did not allege that he was in possession, but merely alleges right of possession in himself. That he was not in possession, and that the defendants were in possession, is apparent from the language of the court, found at page 285, where it is said: "The action was in the nature of one in ejectment." The defendants denied the allegations of the complaint, and one of them filed a cross complaint alleging title in herself, claiming that plaintiff's ownership of the land should be declared invalid, and that he should be perpetually enjoined from setting up or making any claim to said premises, and that her claim should be quieted. And at page 285 it is said:

> "Actions to quiet title or to determine adverse claims under Section 3511 * * * may be of a legal or equitable character, depending upon the pleadings.
>
> "In the present case, defendant, in her cross complaint, asks for equitable relief. The court heard the case before the jury until the facts were disclosed, and then discharged the jury, and found the issues for the plaintiff." * * *

And having determined that the plaintiff's action was one in the nature of ejectment, in which the parties would be entitled to a trial by jury, proceeded as follows:

> "In such cases the equitable issue should first be

> passed upon by the court, and whenever an issue of fact, as distinguished from an equitable issue, is to be determined, that question should be left to the jury under proper instructions from the court."

There is no intimation in the opinion of the court that a bill to quiet title could not be maintained under the statute by one in possession against one out of possession who is asserting an adverse claim or interest in the property. That such a suit may be maintained, was expressly decided by the Supreme Court of Utah in the case of Mining Company v. Mining Company, 5th Utah, page 3.

We are unable to understand how it can be claimed that the case of Park v. Wilkinson is in conflict with the decision of the Circuit Court of Appeals, in which it was determined that the complainant was in the possession of the premises involved, and that the defendants were not in possession, but were mere trespassers. What the court meant by the language, "In such cases the equitable issue should first be passed upon by the court, and whenever an issue of fact, as distinguished from an equitable issue, is to be determined, that question should be left to the jury under proper instructions from the court," doubtless was, that where an equitable defense was interposed in an action of ejectment, or where, by cross complaint, the defendant sought equitable relief, the question involved in such equitable defense or cross complaint should be first disposed of by the court, and if the defendant was defeated on such equitable defense, or on such cross complaint, that then the legal issues joined by the complaint and answer should be tried by a jury. We take it, the

court could not have intended to rule, that whenever in a suit in equity some legal question arose or some one legal issue was involved, such as might also arise or be involved in an action at law, a jury should be empaneled to determine such question, or that the parties should be required to resort to a court of law to have such question or issue determined. As said by this court, in the case of Holland vs. Challen, supra: "It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

THIRD.

As further grounds for the issuance of the writ, it is stated in the petition that the decision of the Circuit Court of Appeals, in this cause, is in conflict with the decision of this court in the case of Argentine Company v. Terrible Company, 122 U. S. 478; and, also, that the decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of the State of Utah in the case of Lavagnino v. Uhlig, 26 Utah, page 1. These two grounds may properly be considered together. We trust that we may be able to show that there is no such conflict. At page 11 of the petition it is said:

> "That the questions and propositions of law involved in this case are substantially as follows:
>
> "1.—Can a prior locator of a junior patent, prove his alleged prior location against a senior patent, covering the same ground and the lode or lodes embraced and apexing therein, and thus attack col-

laterally, and defeat the senior patentee's title either to such surface ground, or the lode or lodes apexing therein, when there is no express exclusion or exception in the senior patent in favor of the prior location, on which the junior patent is founded?

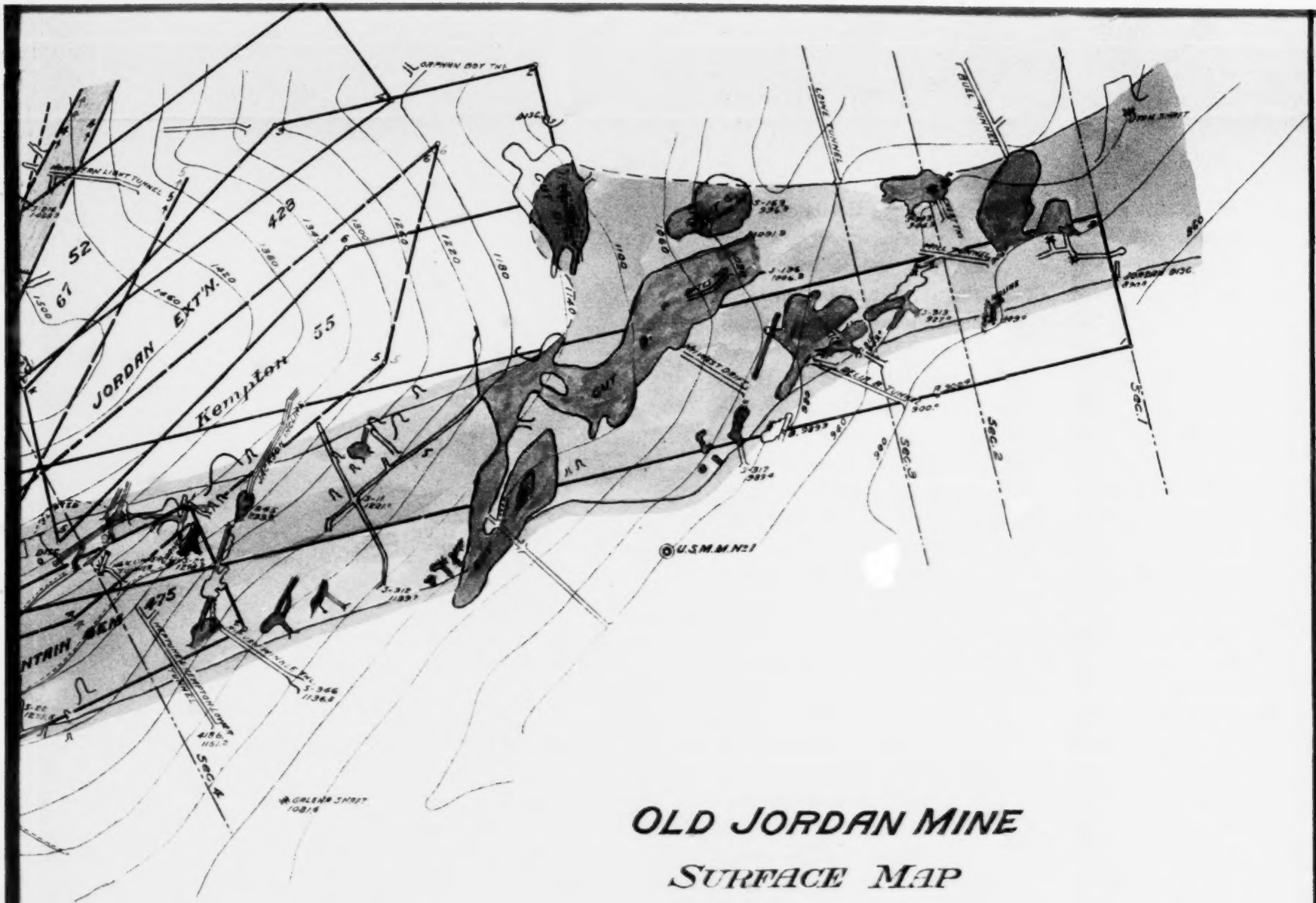
"2.—Can a junior patentee of mining ground, and of the lode or lodes apexing therein, whose patented ground is covered by a senior patent and which ground and lode or lodes are expressly excluded and excepted in the junior patent in favor of the senior patent, prove a prior location of the ground thus excluded and excepted in the junior patent, and thereby cancel or annul the exception in the junior patent. In other words, in such case, is the prior location the superior title to the senior patent notwithstanding such exclusion and exception in the junior patent in favor of the senior patent?"

We contend that the propositions of law involved are not such as are stated in either or both of the interrogatories above quoted. The complainant did not lay any claim to any portion of the surface ground included within the exterior limits of the Kempton claim, lot 55; neither did the Circuit Court of Appeals decide that complainant was entitled to any part of the surface of that claim; and the same is true as to the Ashland, lot 67.

The questions of law discussed in the Circuit Court, and also in the Circuit Court of Appeals, were:

First.—Whether the senior locator of a claim upon a broad lode is entitled to the entire lode on its dip between the end lines of his claim extended indefinitely in their own direction, notwithstanding his location embraced a portion—not the entire—width of the lode at its apex? And,

FAIR VIEW
NORTHERN LIGHT
GRIZZLY
JORDAN
64
54
53



OLD JORDAN MINE

SURFACE MAP

Scale: 200 Feet to 1 Inch.

J. Fewson Smith, Jr. M.E.

Second.—If he had such right, did he lose it by permitting a junior locator, whose claim conflicted to some extent with his, and also embraced a portion of the width of the lode at its apex, to procure a patent for such junior location without protest or adverse claim on the part of the senior locator?

It was contended by counsel for the defendants, that where a junior location embraces any of the area included within the lines of a prior location, and the owner of the junior location was permitted to obtain a patent to his claim, including the conflict area, that it was thereby conclusively determined, not merely that he had a superior right to the conflict area, but that his location was prior in time to the senior location, and this, too, notwithstanding the question of priority of location was in no way involved in the proceedings which resulted in the issuance of patent to the junior claim.

(Before proceeding with the discussion of these questions, we wish to invite attention to some of the features shown upon the map hereto attached, Exhibit T:

The Kempton, lot 55, is, as shown upon the map, an octagonal figure. In order that the court may more readily distinguish the locations of the petitioners from the claims of the complainant, we have had the posts of the Kempton and Ashland designated by red figures, so that, commencing at the westerly end of the Kempton and at the northwest corner thereof, will be found the figure 1 in red, and following the boundaries of the claim thence, first southerly to figure 2, southeasterly to figure 3, easterly to figure 4, northeasterly to figure 5, thence to figure 6, thence

southeasterly to figure 7, thence easterly to figure 8, and thence easterly to figure 1, the place of beginning.

The Ashland is laid on a course somewhat east of north, and is shown by the red figures, commencing at the southeasterly corner of the claim, as shown by the figure 1 in red, thence westerly to figure 2, northeasterly to 3, and thence to 4; the opposite side line of the claim is designated by the figures 1, 6 and 5, in red. The area in conflict between the Ashland and the Northern Light is shown upon the map in a light slate color. That conflict is excluded from the Ashland patent in favor of the Northern Light. The blue color on the map represents the limestone lode. At the westerly end of the limestone shown upon the Exhibit, is found a very massive body of porphyry (testimony of Mr. Holden, Record p. 357, and testimony of Mr. Palmer, Record p. 421), the contact of which with the limestone is shown upon the Exhibit in green. The Ashland fissure, referred to in the statement of facts, is shown upon the Exhibit by a broken black line running in a northerly and southerly direction, and over which the words "Ashland Fissure" are written.

As shown by the map, the Jordan, lot 64, is the only claim laid upon this limestone belt or lode, from its [illegible]-erly extremity, as shown, westerly to the east end line of the Mountain Gem, save a very small fraction lying northerly of the line of the Kempton running from post 4 to post 5, and extending from the work marked "Jackson Incline" westerly to the easterly end line of the Mountain Gem.

It will also be seen, by reference to the map, that from

the east to the west end line of the Mountain Gem, fully half of the lode lies outside of and southerly of the Kempton, lot 55, and is covered by the Mountain Gem; and that, from the westerly end of the Mountain Gem, proceeding westerly, almost the entire width of the lode lies outside of and south of the Kempton.)

Where two or more claims are so laid upon a lode of great width at its top or apex, that each of the claims embraces a portion of the width of the apex, thus bisecting the lode longitudinally, the senior locator is entitled to the entire lode, and may follow it in its course downward indefinitely between planes drawn vertically downward through the end lines of his claim projected in their own direction. This doctrine, so far as we have been able to ascertain, was first announced by this court in the case of Argentine Mining Company v. Terrible Mining Company, 122 U. S., where it is said (pages 484-5): "Assuming that on the same vein there were surface out-croppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein." See also Bullion, etc., Co. v. Eureka Hill Co., 5 Utah, pages 3, 49-55. See also Last Chance Mining Company et al. v. Bunker Hill & S. M. & C. Co., 131 Fed. Rep., page 570, where it is held that the fact that a vein or lode is of such width on the surface as to extend beyond the side lines of the claim located thereon, does not affect the extralateral rights of such claims against a junior location. See page 588. The same doctrine is announced in the case of the

Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., in 131 Fed. Rep., page 591; read pages 604-5.

St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. Rep., 664;

Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. Rep., 417, 419-20.

In the case now before the court, the patent for the Jordan lode mining claim, lot 64, was based upon a location made September 17th, 1863, and the patent for the Mountain Gem, lot 475, was based upon a location made August 20th, 1864. The Kempton, lot 55, went to patent on a location made in 1871. It does not appear what the date of the location was upon which the patent to the Ashland was issued. Therefore defendants may not show or claim title prior to the date of the patent. See statement of facts, page ..... It follows, therefore, under the doctrine announced in the cases above cited, that the complainant is entitled to take the lode in its entirety as it goes to the deep, unless it was deprived of such right by failure to assert an adverse claim to the Kempton application for patent, as contended by counsel for petitioners. We submit that the general rule is, that the title conveyed by patent relates to the inception of the patentee's right, that is to say, in this case, to the date of the location upon which the patent issued. See Smelting Co. vs. Kemp, 104 U. S., 633, 647; Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 510; Stark v. Starr, 6 Wallace, 418. It is needless to multiply authorities upon this proposition.

It is contended by defendants, however, that this rule

has no application to a case where the senior locator of mining ground suffers a junior locator, of a portion of the same territory, to go to patent on his junior location, without filing and successfully maintaining an adverse claim. We freely admit that this is true so far as the surface conflict is concerned, and admit that it is true also as to extra lateral rights on any vein, the *entire* apex of which may be found within such surface conflict, and also as to any vein, no portion of the width of the apex whereof, is found within the senior location; but we insist that beyond the scope of this admission, the contention of defendants finds no support either in reason or authority. Their position is: That when the owners of the Jordan and the Mountain Gem suffered the Kempton to go to patent without protest, they were thereby and thereafter forever barred and estopped from contending that their claims were located prior to the Kempton, not only as to any portion of the surface area included within the Kempton patent, but also as to every part and portion of the Jordan and Gem claims lying outside of such area. They say an application for patent for a mining claim is a proceeding *in rem*, and that the issuance of a patent thereon binds and concludes all the world. This also we concede. But they further contend that the issuance of the patent in and of itself not only determines that the patentee has the better title to the conflict area between the location on which his application is based, and that of another location held by some third person, but that it is also a conclusive determination that his location is in fact prior in time to such other. This latter branch of their contention we deny emphatically.

The defendants to maintain the position taken by them are obliged to show, First: That the Jordan, the Gem and the Kempton, as severally located involved a surface conflict—for if no surface conflict, we had no right to be heard in opposition to the Kempton application for patent.

When one applies for a patent to mining ground, and another claims that the ground, as surveyed for patent, conflicts in part with a location owned by him, and files his adverse claim and brings his suit to determine the right of possession as between him and the applicant, pursuant to the Act of 1872, the title and right of possession to the *surface conflict* is alone involved.

"The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts or questions involving extralateral rights are not the subject of adverse claims." —2nd Lindley on Mines, Sec. 730.

Second: The defendants to maintain their position must show that a patent for the Kempton could not have been issued unless it had been determined as a matter of fact that the Kempton location was first in time.

He who in any suit in equity, or action at law, claims that his opponent is barred or estopped from asserting or denying a given fact, on the ground that in some former proceeding, or in a former action between the same parties, on a different cause of action and involving a different subject matter, the particular fact was determined, has the burden of showing clearly either that such fact was di-

rectly involved and passed upon in such former proceeding or action, or that the judgment or determination rendered or made therein could not have been rendered or made without passing upon that very fact.

Now, as we have already pointed out, there is substantially no conflict between the Kempton, lot 55, and the Jordan, lot 64, until we reach the easterly end line of the Mountain Gem, and defendants have made no attempt to show that there was any surface conflict between the Gem and the Kempton, as severally located. Both the Jordan and the Gem were located prior to any legislation by Congress on the subject of locating mineral lands—when the subject was governed wholly by the local laws and regulations of the district.

In the case of Del Monte M. Co. v. Last Chance M. Co., 171 U. S., page 55, it was said by this court, at page 64 (speaking of the Act of 1866):

> "Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was 'fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine." * * * "As might be expected, the patents issued under the statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom."

What were the local laws and regulations of the West Mountain Mining District at the time these several claims were located? Did they limit the surface area? If so, how? Did they prohibit the taking of any surface ground, or any, say, beyond ten or twenty feet? If so, there could have been no surface conflict between the Gem and the Kempton, and hence no chance to resist by way of adverse claim the Kempton application for patent. Even under the Act of 1866, the locator of a mining claim was not required nor permitted to locate a tract of ground. All that he was permitted by that Act to do by way of location, was to locate a lode, and only when he made application for patent under the Act, was he required to file a diagram "so extended laterally, etc.," as to conform to the local laws of the district. See 14th Statutes at Large, 252, Sec. 2.

What was the limit of surface then allowed by the law of the West Mountain District? We are not informed. Peradventure not more than twenty-five feet. If so, there could have been no surface conflict between the Gem and Kempton. Hence no right to oppose the application for patent for the latter. When was that application made? Was it under the Act of 1866 or that of 1872? We are not informed. We cannot be estopped if we had no chance to be heard; we could have had no chance to be heard if there was no surface conflict. The burden was upon defendants, who rely upon the estoppel, to show what the facts were in this regard. They made no attempt to do so, but contented themselves with raising the question of estoppel upon the final argument, without evidence of any of the essential facts upon which to rest it.

But conceding for the sake of the argument that there was a surface conflict between the Jordan and the Kempton, and the Gem and the Kempton: Does the issuance of a patent to the Kempton, including such conflict or conflicts, necessarily determine that the Kempton location was prior to either of the others? By no means. It might well be, for aught that appears, that the owners of the Jordan and Gem had conveyed such conflicting areas to the Kempton. Would they thereby invest the Kempton owners with the right to insist that the location thereof was prior to that of the Jordan and Gem? To ask the question is to answer it. Or it might be that the Kempton had acquired title to the conflict area by adverse possession, as provided in the Act of 1872, and, therefore, became entitled to a patent to the same. But would that fact at all affect the question of priority of location of the respective claims? Surely not. Even under the Act of 1872, by virtue of which the locator of a mining claim is required to locate a tract of ground within which he has discovered a vein, and to so mark his location as that its boundaries can be readily traced, the issuance of a patent to a junior locator, including a claimed conflict with a senior locator, would not estop the latter from showing that his location was in fact senior to that of the patentee, although it would preclude him from asserting any title by right of such prior location, or otherwise, to the conflict area. Take a simple test: A, the senior locator, has embraced within his location the greater portion of the width of apex of a broad lode, and has marked his location definitely on the ground; B, a junior locator, has also laid his claim so

as also to embrace a portion of the width of apex of the same lode; now B applies for a patent, and A adverses, claiming that the ground for which B has so applied conflicts with A's earlier location; B replies, admitting that A's location was prior to his, and that it covered a portion of the width of the vein, but insists that A so marked his location on the ground as to exclude the conflict area; B's contention in this respect is successfully maintained, judgment goes in his favor, and he obtains a patent including the conflict: Has it thereby been adjudicated that B's location was prior to A's? Of course not. Has it thereby been determined that A's earlier location did not include a portion of the width of the vein? Again we say, of course not.

Our friends are seeking to invoke the doctrine of *res judicata*, which in its two branches may be stated as follows: First, a judgment between parties in one action or proceeding, is in a second action between the same parties or their privies involving the same subject matter, and founded upon the same cause of action as the first, an absolute bar not only as to every matter which was actually litigated and determined in the former action, but also as to every other matter which might have been litigated and determined therein.

Second: In a second action between the same parties founded upon a different cause than that involved in the first, or involving a different subject matter, the judgment in the former action is a bar only as to such matters as were in fact put in issue and determined in the former; it does not conclude the parties at all as to matters which

might have been, but which in fact were not litigated or determined in the former suit.

As we have before pointed out, it must, in applying the latter branch of the doctrine of *res judicata*—either appear affirmatively that the particular facts (claimed to have been adjudicated) were determined in the former suit, or that the verdict, judgment or decree therein, of necessity could not have been rendered without passing upon and determining those facts. The estoppel which the defendants are seeking to invoke here falls within the second branch, as above stated, of the doctrine of *res judicata*. And the fundamental fallacy in the position taken by our friends is found in the erroneous assumption that a patent cannot issue which includes a conflict between two mining claims without of necessity determining that the patentee is entitled thereto by reason of the fact that the location under which he claims is in fact prior to the location of his adversary; while it must be at once apparent that notwithstanding his adversary's location might have been first in time and have included a portion of the width of the apex of the vein, yet he would be defeated in the patent proceedings as to the alleged conflict area upon grounds which do not involve or touch at all the question of priority.

Let us here call attention briefly to some of the authorities upon the doctrine of estoppel. "The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty the precise

points determined, and not from inference and argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not determined." 1st Hermann Estoppel, pages 289, 290. And again on page 291:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, * * * * * it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the same parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence aliunde, consistent with the record, may be received to prove the fact; but even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be concluded."

In Lewis vs. O. N. & T. Co., 125 N. Y. 341, it is said at page 348: "In a case where a judgment may have proceeded upon either or any of two or more different or dis-

tinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact, must show affirmatively that it went upon that fact, or else the question is open to a contention."

In Russell vs. Place, 94 U. S. 606, the rule is stated as follows at pages 608, 609: "The general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence is this: "That to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

And in Cromwell vs. County of Sac, 94 U. S. 351, (which has ever since been regarded as a leading case upon this subject) the Court says at page 363: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a case upon a different cause of action, the inquiry must always be as to the point or question actually litigated and

determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." And at page 356: "It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been adjudicated therefore such possible question is to be considered as excluded from consideration in the second action between the same parties upon a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Apply that language to defendants' contention here. Let us suppose that there are two mining locations substantially parallel and each including a portion of the width of a broad vein at its apex; the junior locator applies for a patent, and by his survey includes within his application an infinitesimal piece of the territory which was included

in the senior location, say one one-thousandth of an acre out of one corner of the senior claim; the senior locator fails to adverse the application because the area, so wrongfully included within the junior application, is so insignificant and of such little value that it would not justify the expense, trouble or annoyance even of a contest, and so suffers the junior locator to obtain his patent as applied for: What is the result according to defendants' contention? This, namely: That thereby the senior locator not only lost this infinitesimal conflict, but that in any subsequent action that might arise between the parties thereafter involving any portion of the lode outside the conflict area, the senior locator would be estopped and precluded from showing that his location was indeed the first one made upon the lode. Such is not the doctrine of *res judicata* as expounded by the courts, as we understand the decisions.

It is true that in 2d Lindley, Sec. 783, the contention of defendants finds support, if there be a surface conflict, the author saying: "So it would seem that where an adverse claim is filed, showing surface conflicts the judgment rendered in the action, upon the basis of which the patent ultimately issues, is conclusive in its effect, not only as to the surface area directly involved, but determines priority in favor of the successful litigant as to all rights flowing from the respective locations. The question of priority having been actually or presumptively adjudicated as to one part of the conflicting claim, the judgment necessarily extends to and affects the portion not included in the conflict area, and a subsequent conflict of underground

rights arising in such a case must be determined by the priority actually or presumptively established in the patent proceedings."

We think it may be safely said that the passage quoted is not marked by that nice discrimination which usually characterizes the very valuable treatise of this author.

The only case which the learned author cites in support of the text as quoted, is that of Last Chance Mg. Co. vs. Tyler Mg. Co., 157 U. S. 683. A reading of that case will show that it lends no support whatever to the text, but went upon the ground solely that the question of priority had in a former action between the same parties been directly put in issue and actually determined. The case itself involved a question of ownership of an ore body lying beneath the surface of the Last Chance. It was manifest from the manner in which the vein at its apex traversed the Tyler and Last Chance claims, respectively (see diagram, page 685,) that the question of ownership depended solely upon the fact as to which of these claims was first located. It appeared that prior to the commencement of this action the owners of the Tyler had made application for patent for that claim, including the triangle "A," shown on the diagram, which conflicted with the Last Chance location; that the Last Chance adversed the application and in due time brought suit, as required by the statute, in support of its adverse claim; that by its complaint in that action it alleged and based its right to recover upon the ground that the location of the Last Chance was prior to that of the Tyler, and solely upon

that ground. Judgment was rendered in that action in favor of the Last Chance upon a finding of fact: "That at the time the said Tyler Mining Claim was located that portion of the ground so in conflict as aforesaid had been located as a part of the Last Chance Mining Claim, and was not subject to location by the locators of the Tyler Mining Claim." The fact of priority having been expressly involved and determined in that action, the Supreme Court of the United States, adherring to the doctrine of *res judicata,* held that the fact of priority could not be again litigated in a subsequent action.

Almost at the outset of the opinion we find this language: "The law with respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is, therefore, not conclusive in this as to matters which might have been determined, but only as to matters which were in fact determined."

Then after reviewing the pleadings, findings and judgment, the Court proceeds at 689 as follows: "Thus it appears that the complaint alleges a priority of location, and upon that rests the right to recover * * * * * The findings are express as to priority and contain no suggestion of any defect in the Tyler claim, or any fact in favor of plaintiff's right other than that of priority of location, while the conclusion of law and judgment recite and adjudge a valid location of the Last Chance Mining Claim on September 17th, 1885, and a right of possession

by virtue thereof. Upon the record taken as a whole there can be no escape from the conclusion that the Court determined the question of priority of location, and upon this rendered judgment for the plaintiff." And at page 691: "But if we ignore the findings altogether and look simply at the judgment and the complaint, this will appear: "The single ground stated in the complaint upon which superiority of right is claimed, is priority of location. A judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it can rest (but now note what follows): It is doubtless true, as suggested, that other questions may be litigated in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. *The only pleading upon which the case passed to trial and judgment was the complaint, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location.*"

Keeping in mind the facts in that case, one cannot read the opinion and escape the conclusion that the Court would have held that the question of priority of location was not concluded by the judgment in the adverse suit, had it not clearly appeared from the record therein that the very question of priority was directly involved and expressly adjudicated in the adverse suit.

Reference to the diagram in that case furnishes ready illustration of how irrational it would be to hold that the question of priority of location is necessarily involved and determined by the judgment in an adverse suit. For in-

stance: Let it be supposed that in the adverse suit the Last Chance had by its complaint (so far as the question now before us is concerned) simply alleged that it was the owner of, in possession and entitled to possession of the triangular piece of ground "A," and that on the trial it had established that the Tyler as located never included the triangle; that fact being established, judgment would necessarily go in favor of the Last Chance, and the question of priority could not have been the subject of inquiry even.

The case of Montana Company vs. the St. Louis Company was twice before the Circuit Court of Appeals for the Ninth Circuit, the first case being found in 102 Fed., page 430, and the second 104 Fed. 664. From the first case we learn that the Montana Company as owner of the St. Louis Mining Claim had made its application for patent therefor; that the owners of the Nine Hour claim, the predecessors of the St. Louis Mining Company, filed an adverse claim and brought their suit in pursuance thereof, claiming that the Montana Company's claim, as surveyed for patent, was made to include a 30-foot strip of ground which belonged to the Nine Hour claim; that by agreement between the parties it was provided that the Montana Company should go to patent upon its application and should thereafter convey the 30-foot strip to the owners of the Nine Hour, which was thereafter done accordingly, and the question was what were the rights of the respective parties under this agreement and conveyance, and at pages 432 and 433 the Court says: "If the adverse action which was brought by the owners of the Nine Hour claim

had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a *surface line of division* between the two claims, without affecting rights to the ores beneath the surface, otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extra laterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundaries upon the very line which they contended was the true line."

In the second case the court was called upon to decide what were the extra lateral rights of the respective parties, in view of this conveyance on the Drum Lummon vein, and the Court carried to its legitimate conclusion the decision in the former case. The diagram found at page 665 shows that the moment you pass the 108-foot plane a portion of the width of the apex passes out of the St. Louis into the 30-foot strip, and from thence until you get to the 133-foot plane, a portion of the width of apex is in one claim and the balance in the other, and that at the latter plane the entire width of apex passes out of Montana ground. The St. Louis Company claimed that the extra lateral rights of the Montana Company ceased at the first plane, while on the other hand it was claimed by the Montana Company that its extra lateral rights upon the vein

were not terminated until the 133-foot plane was reached. The decision was in favor of the Montana Company and was rested expressly upon the ground that having the older location covering a portion of the width of the apex, it was entitled to the whole vein to the extent that any portion of the apex continued in its territory.

Counsel for petitioner here would have answered the question quite differently. They would have said: "Oh, no, the decision in favor of the owners of the Nine Hour claim in the patent proceedings forever determined that the Nine Hour claim was located prior to the location of the St. Louis claim."

We submit, therefore, that the patent to the Kempton established the surface boundary, or line of division, between the Kempton and the Jordan and between the Kempton and the Mountain Gem. It also conclusively determined that the patentees to the Kempton had the title and exclusive right of possession to the surface conflict area—if any there was. But it was not determined by the issuance of the patent that the location of the Kempton antedated the location of the Mountain Gem or that of the Jordan.

What, if any, extralateral rights were carried by the patent could only be determined by developments in the ground such as would disclose not only the existence of a vein, but also where the top or apex of such vein was found and what its course or strike was within the limits of the patented surface. If within the conflict area there were found the top or apex of a vein, the entire width of which was included within such area, such vein would be

conveyed by the patent to the owners of the Kempton; but if a part only of the width was so found within the Kempton surface, and the balance of the width of the apex was covered by locations senior to that of the Kempton, and such senior locations were so laid upon the course or strike of the vein at its apex, as to give to such senior location, or locations, extralateral rights, such extralateral rights could not be curtailed in any manner by the owners of the Kempton claim.

So far as the question of these extralateral rights is concerned, the case is on all fours with that of Empire State-Idaho M. & D. Co. vs. Bunker Hill S. M. & T. Co., 114 Federal Reporter, page 417.

It will be seen by reference to the diagram in that case, page 418, that the San Carlos, which was the junior location, was so laid upon the apex of the vein as to cover a very substantial portion of the width thereof. Indeed, at the westerly end of the San Carlos location, it covered practically the entire width of apex. The Viola, the senior location, covered the balance of the width of apex. As to the surface of the San Carlos including that portion of the surface which was laid upon the lode, it had the title and exclusive right of possession, upon which surface the owners of the surface of the Viola might not enter. Both the Viola and San Carlos were so laid upon the apex that a portion of the width thereof traversed each claim from end to end. And it was held that the Viola being the senior location of the two was entitled to the entire vein as it went to the deep between planes drawn through the end lines thereof extended in their own direction. It was also

held that the San Carlos had extralateral rights upon the vein between planes drawn through its end lines; but that the extralateral rights of the Viola were prior to those of the San Carlos and that such rights of the Viola must be fully protected and satisfied and that they could not be to any extent interfered with by the owners of the San Carlos.

(That the legal propositions involved were not such as are stated in the first and second interrogatories on page 11 of the petition, but were such as we have here stated and discussed, is shown by the decision of the Circuit Court of Appeals. See 134 Fed. Rep., at pages 75 to 77.)

Since we have always recognized petitioners' ownership and right of possession of the surface of the Kempton, lot 55, including the area in conflict with the Jordan and Mountain Gem, and, in like manner, their ownership and right of possession in the Ashland, and have always conceded that their title to such conflicting surface area was conclusively determined by the patents issued for their respective claims, it is difficult to discover upon what ground it is claimed by petitioners that the decision of the Circuit Court of Appeals in this case is in conflict with either the decision of this court in the case of Argentine Mining Company v. Terrible Mining Company, 122 U. S., or with the case of Lavagnino v. Uhlig et al., in the 26th of Utah.

The latter case was one where the defendants had made an application for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims, and the plaintiff had in due time filed in the Land Office an adverse claim to a portion of each of the Uhlig claims, which overlapped and in-

cluded a part of the "Yes You Do Mining Claim," and thereafter, in due season, brought his action to determine the right of possession of that portion of the Uhlig claims which conflicted with the Yes You Do. It appeared on the trial that one J. Fewson Smith was the locator of the Yes You Do; that at that time and at the time of the trial he was a deputy United States mineral surveyor "attached to the office of the Surveyor General of the district of Utah;" that he had an interest in the litigation, notwithstanding he had made a formal conveyance thereof to the plaintiff Lavagnino. Upon these facts appearing, the trial court held that the location by Smith was in violation of Section 452 Revised Statutes of the United States, and therefore void, and that being void, the plaintiff acquired no rights whatever under the deed to him from Smith, and excluded Smith's notice of location and said deed to the plaintiff. The defendants then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2, and in rebuttal the plaintiff offered to show that the Levi P. and Veta mining claims were at the time of the location of the Uhligs valid and subsisting claims and covered the discoveries of both the Uhlig No. 1 and No. 2, and that the Levi P. and Veta were owned by one Andrew P. Mayberry. This offer was objected to, and the objection sustained, on the ground that no adverse claim based upon the Levi P. and Veta claims had been made within the prescribed period. The summons was quashed as to the defendant McKernan, and the action discontinued as to him. Pending the action, the other defendant, Edmund H. Uhlig, conveyed all his interest in the Uhlig No. 1 and

The foregoing statement of facts is taken from the opinion on

No. 2 to the St. Joe Mining Company. The trial court adjudged that the St. Joe Mining Company and the said McKernan were the owners, in possession and entitled thereto, of the premises in dispute. An appeal was prosecuted to the Supreme Court of the State, and the decree of the lower court affirmed, both as to the invalidity of the Smith location and the ruling of the court sustaining the objection to the testimony offered with respect to the Levi P. and Veta claims. Upon the latter point, the court says, at page 19:

> "The failure of the plaintiff to show, in chief, any right to the premises in controversy, disclosed the fact that he was 'a stranger to the title' of the premises in dispute and that a nonsuit could, on motion, have been properly granted. So that a failure to establish the defendant's claim could in no way benefit him or validate his alleged title to the Yes You Do. Therefore the plaintiff had no more interest in or right to further contest the defendant's claim on the ground that the Levi P. and Veta were valid and subsisting claims than the said Andrew P. Marberry himself or any other stranger had." * * *

And proceeds to cite and quote from cases in support of the proposition that where one makes an application for a patent for a mining claim, any other claimant of an unpatented location which conflicts with the claim as surveyed for patent, must, within the time prescribed by the Act of Congress, file an adverse claim in the Land Office, or he will be precluded from objecting to the issuance of the patent. And at page 23 says:

> "We think it is clear, both from the language of the Sections of the Revised Statutes referred to and

> the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and, as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title, are likewise precluded from protesting on like grounds."

The plaintiff in the trial court, as we have seen, had endeavored to defeat the defendants on the ground that the Levi P. and Veta claims included the discovery point of each of the Uhligs, and were valid and subsisting claims. There must, therefore, have been a conflict between the Uhlig claims and the Levi P. and Veta claims, and it was with reference to this conflict that the court was speaking, as is apparent from the passage last above quoted.

In effect, the court simply holds that one who fails to file an adverse claim within the sixty days' period provided by the statute, is conclusively presumed not to have any claim or location the surface of which conflicts with any portion of the surface of the claim for which application for patent is made. That, however, is not the question which was presented to and decided by the Circuit Court of Appeals. Plaintiff did not assert, and the Court of Appeals did not hold, that it had any right to the area in conflict between the Kempton and Jordan, nor the

Kempton and the Mountain Gem. On the contrary, it was conceded by us, and held by the court, that the patenting of the area in conflict to the Kempton "operated as a declaration or determination that within these surface limits the defendant's claim was superior, but not necessarily that it was prior in location."

The question as to whether, where one makes an application for patent for a mining claim, and so surveys it for patent as to include a portion of a location claimed by another party, and such other party fails to file his adverse claim, he would be estopped from asserting thereafter, in an action involving that part of his claim which lay outside of the conflict, that the location of his claim was, in fact, older in point of time, was not in any way involved in the Lavagnino case, nor is any such question even alluded to. The decision of the Lavagnino case conflicts not at all with the decision of the Circuit Court of Appeals in this case; on the contrary, it is in harmony with it upon the question as to what the effect is of a failure to file an adverse claim to an application for patent.

This brings us to a consideration of the question as to whether there is, as alleged in the petition, any conflict whatever between the decision of the Circuit Court of Appeals in this cause and the decision of this court in the case of Argentine Company v. The Terrible Company, supra.

The Argentine case was one where the plaintiff in the court below brought his action to recover certain mining ground, being part of what is known as the Adelaide lode. It appears from the statement of facts, 122 U. S., page

479, that plaintiff was the owner of the Adelaide mining claim; defendant below was the owner of the Camp Bird, the Pine and the Charlestown lode locations; that the Adelaide was the senior location, having been located in 1876, and the claims of the defendant—plaintiff in error—were located in 1877; that the Adelaide occupied on the surface longitudinally a northeast and southwest direction, while the said claims of the plaintiff in error occupied a position nearly north and south, with end lines practically east and west, thus crosssing diagonally the Adelaide claim; that during the summer of 1880, the defendant below carried its mining operations through its own ground into the Adelaide claim, and that it sought to justify its action by asserting that in doing so it followed a vein which had its outcrop in its own locations. In the trial court, the defendant requested the court to instruct the jury as follows: "The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. The defendant here claims that the lode in controversy originates in its patented territory, by its top or apex, and descends upon its dip through and under the ground in controversy. If, from the preponderance of evidence you believe that the top or apex of the lode in controversy does, in fact, originate within the patented

territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant." Which request to so instruct was refused.

This court, speaking through Mr. Justice Field, says, at page 484:

> "The instruction, as requested by the defendant, as a proposition of law is undoubtedly sound." * * * "Its refusal, however, did not prejudice the defendant, for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked, applied to that claim, cut off the right asserted by the defendant." * * * "But there are other grounds equally conclusive against the contention of the defendant below. The instruction asked assumes that the longest sides of its claims were their side lines. Such would, undoubtedly, be the case if the locations of the claim were along the course or strike of the lode."

And after quoting Section 2320 of the Revised Statutes of the United States, proceeds:

> "When, therefore, a mining claim crosses the course of the lode instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute." * * * "Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those

lines and outside of vertical planes drawn downward through them."

Then comes the clause in the opinion upon which petitioners rely, and which is as follows:

> "The defendant relied on the trial upon patents of the United States issued for its several claims, but those patents contain an exception which would also seem to exclude its pretensions. It is as follows, after the habendum clause: 'Excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also, excepting and excluding all veins, lodes, or deposits, the tops or apexes of which lie inside of the exterior lines of said Adelaide survey at the surface, extended downward vertically, or which have been therein discovered or developed.'"

In Section 587, Vol. 2, of Lindley on Mines (2nd Ed.), will be found a diagram, representing the said Adelaide claim and the said claims of the defendant in the court below; also, the course or strike of the apex of the vein involved in the case, and the "Argentine workings." From this diagram, it appears that all four of the claims were laid across the course of the vein at its apex, and that the workings of the Argentine Company extended beyond the east side line of the Pine claim and entered that portion of the Adelaide which lay to the east of a vertical plane drawn through the east side line of the Pine claim. That it was the work of the defendant in the Adelaide ground, east of the east side line of the Pine claim, which was alone involved in the action, is apparent, we think, from the language of this court, namely: "The lines which separate the location of the plaintiff below from the loca-

tions of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein." * * * "and, as a consequence, *could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them.*"

Where one locates his claim across the course or strike of the vein, his located side lines become the legal end lines, and the located end lines the legal side lines of his claim, for the purpose of determining his extralateral rights; and that he may not pursue the vein beyond such legal end lines, has been repeatedly decided by this court. We cite only the case of Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S., page 56.

But as said in 2nd Lindley on Mines, Section 589, at page 1013:

> "None of the side-end-line cases heretofore reviewed give countenance to the suggestion that where a vein crosses two opposite parallel side-lines, the locator is denied all extralateral right. On the contrary, the irresistible conclusion to be drawn from each of them is, that vertical planes drawn through the side-end lines, produced in the direction of the downward course, will carve out a segment of the ledge throughout its entire depth, which will belong to the locator."

Turning again to the diagram found in Section 587 of 2nd Lindley on Mines, it will be seen that the extralateral rights of the Adelaide—which was the senior location—upon the vein, the apex of which is shown in the diagram, would be southwesterly, and between planes drawn downward through the located side lines of the Adelaide to

and beyond the conflict area between the Adelaide and the Pine claim, and that such right could not be infringed or interfered with by any claim of extralateral rights which the owners of the Pine claim might set up or assert. The location of the Adelaide carved out that segment of the vein which lay between its located side lines, just as effectually as would a location upon a vein which crossed, on its course and strike and at its apex, both end lines of the location.

We invite attention to Section 609 of 2nd Lindley on Mines, and to the diagram found at page 1086, and the comments of the author found in this Section on pages 1084 to 1088 inclusive; and submit that, if in Argentine Company v. The Terrible Company that portion of the lode which lay beneath the conflict, between the Adelaide and the Pine claims, was also involved, the plaintiff in the case would have been adjudged to be the owner as well of that portion of the vein, and that, too, even though the patent for the Pine had contained no exclusion of the conflict between the Pine and the Adelaide. The Adelaide being the senior location, its rights to such segment of the vein became fixed when its location was made, and until forfeited or abandoned, such rights could not be taken away, or at all impaired, by any subsequent patent granted to the owners of the Pine. The case involved no such question as is here involved, namely, whether a senior locator of a mining claim who suffers a junior locator to proceed to patent for a claim which, to some extent conflicts with the senior location, is thereby forever precluded from showing, in an action involving the question of his surface

or extralateral rights to that portion of his location which lay outside of the area in conflict, that his location was in fact earlier than that of the patented claim. There was nothing decided, or passed upon, in that case, which conflicts in any way with the decision of the Circuit Court of Appeals in this cause.

Finally, counsel for petitioners, at pages 8 and 9 of the petition, claim that it was admitted by the complainant that the vein or lode and ore body in dispute in the action was continuous from the Kempton and Ashland ground, and within the excepted and excluded area on its dip downward to the lower workings of the mine, and in support thereof, quote from the record as follows:

"Q.—Now, I wish, Mr. McNeill, you would describe what you know about the continuity of the vein from the top, where you say you mined the croppings in 1884, down to the lower workings in the Ashland fissure, if you know it?

"Mr. Dickson: As to continuity of the ore, speaking of the bed vein, or the fissure vein, as testified to by other witnesses, we do not dispute, we do not question."

We add, that thereupon the following occurred:

"By Mr. Hiles: Do you make any question about the ore in the fissure being stratified differently from the ore in the bedded vein?

"By Mr. Dickson: Yes, sir." (Record, pages 294-5.)

All we desire to say in answer to this is, that from the outset to the present time, the claim of the complainant was, and is, that all of the ore bodies in controversy are found within the limestone lode hereinbefore referred to;

that this limestone belt, lying within or between its enclosing quartzite walls, is so extensively mineralized that it can only be regarded and treated as one lode, within the meaning of the law; that it is not practicable to divide it into separate lodes; and we do not hesitate to repeat the statement or admission, that one can start in ore at the surface in this lime belt and follow ore continuously to the deepest workings.

We respectfully submit that the petition for the writ of certiorari should be denied.

WILLIAM H. DICKSON,
GEORGE SUTHERLAND,
Solicitors for United States Mining Co.

A. C. ELLIS,
A. C. ELLIS, JR.,
WALDEMAR VAN COTT,
E. M. ALLISON, JR.,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 264.

LEONIDAS M. LAWSON, WILLIAM J. HARVEY, EDWARD BALBACH, JR., ENOS A. WALL, THE IVANHOE MINING COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

UNITED STATES MINING COMPANY, A CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

The first thirty-three pages of the brief for petitioners are devoted to an abstract or statement of the case.

Owing to oversight or misapprehension on the part of the learned counsel who prepared this statement, it is

in many important particulars erroneous and misleading. The respondent controverts the same and makes the following statement of the case.

STATEMENT.

The suit is one to quiet title to certain mining claims and the ores therein. It was commenced on the 19th day of February, 1902. An amended bill was filed by respondent upon the 2nd of June following. In the amended bill (record pp. 1-8) it is alleged that the complainant is the owner and in the possession, of the "Jordan Extension," "Northern Light," "Fairview" and the "Grizzly" Mining Claims, situate in the West Mountain Mining District, Salt Lake County, Utah, and that beneath the surface and within the boundaries of said claims, extended downward vertically, there is a vein or lode of mineral-bearing rock in place, carrying gold, silver, copper, lead and other valuable minerals, which said vein or veins and lodes, and all the minerals therein contained, are the property of the complainant; that said four claims are contiguous and adjacent to one another and to other mining claims, all of which are owned, occupied and worked by the complainant, as a group of claims, forming one property, for mining purposes.

(The Ivanhoe Mining Company, one of the petitioners, was not made a party to the cause until after the case was called for trial.)

It is further alleged in the amended bill that the defendants therein named, and each of them, assert and claim an interest in said premises, and the ores and min-

erals therein contained, adverse to the complainant, and assert and give out in speech that they are the owners of said ores and minerals, contained in said premises, beneath the surface of each of said four mining claims, and have the right to enter and mine and remove such ores; that the alleged claims and assertions of said defendants and each of them are false, untrue and unfounded in fact, and are a cloud upon the title and possession of the said complainant.

It is further alleged that within two years last past, said defendants, in assertion of their alleged claims and interests, in and to the ores and minerals aforesaid, have, from time to time, wrongfully and unlawfully, by means of secret underground works, drifts, excavations and other openings, entered into and upon said Jordan Extension, Northern Light and Grizzly Claims, beneath the surface thereof, and have mined, extracted and removed and converted to their own use, large and valuable quantities of ores, etc., and that unless restrained by order of the court, defendants will continue their said unlawful assertion of ownership, and their said unlawful extraction of ore from said premises.

The bill then, in the charging part thereof (Par. 9, record pp. 5-7), sets forth that the defendants are in possession of and working a certain mining claim, known as the Kempton Mining Claim, and upon information and belief alleges that the defendants pretend that the mineral vein, deposits and ores beneath the surface of said Jordan Extension, Northern Light, Fairview and Grizzly Mining Claims, are part of a mineral vein, in and belong-

ing to said Kempton Claim, and on the lateral dip of an alleged vein in said Kempton Mining Claim, and having its apex therein, and pretend that they have a right, as owners and occupants of said Kempton, to enter and extract ores from beneath the surface of the said four claims of the plaintiff; whereas the plaintiff charges the contrary to be true, and alleges that for more than two years last past, it has been, and still is, the owner and in possession of two certain mining claims, situate in said district, to-wit: the Jordan Mining Claim, Lot 64 (describing it), also the Mountain Gem Mining Claim, Lot 475 (describing it), and that the said Jordan and Mountain Gem Claims each contains a lode of rock in place, carrying silver and other metals, and that the Jordan Lode enters its surface ground across the northeasterly end line thereof, and on its strike and at its apex, runs southwesterly in said claim, between the side lines thereof, for a distance of over 1550 feet; that said lode then enters the Mountain Gem Claim, across the northeasterly end line thereof, and continues on its course and at its apex southwesterly, between the side lines of the said Mountain Gem, throughout the entire length of said claim, and that said lode in the said Jordan and Mountain Gem, dips northwesterly towards the said Kempton Claim; that said Jordan Claim was patented on the 14th of July, 1877, said patent being based upon a location made on the 17th of December, 1863; that the plaintiff has succeeded to the title of the patentees of said lode; that said Mountain Gem was located on the 30th of August, 1864; that a patent from the Government of the United States, based upon

said location, has been granted, and that plaintiff has succeeded to said title of said patentees; and further, it is charged in the bill, that if there is any vein or lode in the said Kempton, dipping, or in anywise extending to or under the said Jordan Extension, Northern Light, Fairview or Grizzly Mining Claims, or either of them, such vein does not apex in said Kempton Mining Claim, or belong thereto, or form a part thereof, but that the same is a part of, and belongs to, the said Jordan, Lot 64, and Mountain Gem Lodes, the property of the complainant, which lodes, in their dip and between protractions in their own direction of the parallel surface end lines of said claims pass across and beneath the side lines, and extending across and beneath the surface of the said Kempton, enter into and beneath the surface of the said Jordan Extension, and that the ores found beneath the said last named claim in said lodes, are the same the defendants wrongfully pretend are in or belong to a lode or lodes in said Kempton, and not otherwise.

It is further alleged in the bill that the complainant has no sufficient remedy at law for the wrongs done and threatened to be done; that the remedy at law is inadequate and can afford no protection to the complainant against the wrongful and unlawful claims and assertions of said defendants, and the trespass and waste threatened to be done.

The relief prayed for in the amended bill was that the defendants' asserted adverse claim of interest be declared null and void; that the title and ownership of the complainant in and to said Jordan Extension Mining

Claim, Northern Light Mining Claim, Grizzly Mining Claim and Fairview Mining Claim, and the ores and minerals contained therein, vertically beneath the surface boundaries thereof, be established and confirmed as against any and all claims of said defendants, or either or any of them, and all cloud thereon forever removed, and that said defendants and each of them be forever enjoined and restrained from asserting any claim whatsoever in and to said premises and the ores and minerals therein contained, and from working in, upon or beneath the surface of said Jordan Extension, Northern Light, Grizzly and Fairview Mining Claims, or doing any act or thing adverse to the title and ownership of complainant. (Record pp. 7-8.)

The charging part of the bill, of course, might well have been entirely omitted under Equity Rule 21. The equity of complainant's case is fully set forth in the narrative or stating part of the bill, and every material fact necessary to entitle complainant to the relief prayed for is therein stated.

To this bill the defandants filed a demurrer which will be found on pages 9 and 10 of the record. The decision of the Circuit Court overruling the same will be found record pages 11-14.

The demurrer having been overruled, defendants, on the 26th day of July, 1902, filed their original answer to the amended bill. (Record, pages 14-23.)

Thereafter and when the case was called for trial, the defendants applied to the court for an order requiring complainant to make the Ivanhoe Mining Company, a cor-

poration of California, a party defendant to the suit, and such order was made and the complainant directed by the court to amend its bill by inserting the name of the Ivanhoe Mining Company wherever proper, which was thereupon accordingly done. (Record, p. 39.)

Thereafter, and on the same day, to-wit: the 17th of October, 1902, the defendants filed an amended answer on behalf of the original defendants, and also on behalf of the defendant, the Ivanhoe Mining Company, (Record, pp. 24-34) which, after denying all the material allegations of the bill, contains the following averments:

"And these defendants, further answering the said amended bill of complaint, admit that they are in possession of and are working, a certain mining claim adjoining the said Jordan Extension Mining Claim, the Northern Light Mining Claim, the Grizzly Mining Claim and the Fairview Mining Claim, * * * known as the Kempton Mining Claim, U. S. Lot No. 55, which was located in the year A. D. 1871. * * * These defendants aver, that the fact is that some of them are the owners, seized in fee, and with their other co-defendants herein, who are lessees thereof for years, are in the peaceable occupation and possession, and entitled to the possession, of the said Kempton Mine and Minig Claim, in and embracing the Neptune Lode, (describing the same), patent therefor having been granted by the Government of the United States on or about the 23rd day of February, A. D. 1875, to the grantors and predecessors in interest of these defendants, together with all the mineral therein, and all the metalliferous lodes embraced therein, the tops

or apexes of which lie inside of said surface boundaries and lines extended downward vertically, although such veins and lodes so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said claim and location, and including therein the said Neptune Lode and vein, which has its top and apex within said surface boundaries in Kempton ground, and these defendants aver further, that said alleged Jordan Extension Mining Claim, said alleged Northern Light Mining Claim, said alleged Grizzly Mining Claim and said alleged Fairview Mining Claim, lie to the north of and immediately adjoining said Kempton ground, and that the discovered and existing lode in said Jordan Extension Claim, Northern Light Claim, Grizzly Claim and Fairview Claim, has its top or apex in said Kempton ground, and extends in its dip northerly beyond the northerly vertical side line of said Kempton Claim, and underneath a part of the surface of said alleged Jordan Extension Mining Claim, Northern Light Mining Claim, Grizzly Mining Claim and Fairview Mining Claim, and is known as and called the Neptune Lode, and the same has hitherto for more than twenty-five years before the commencement of this action, been continuously occupied, possessed, mined and worked by defendants and their grantors and predecessors in interest therein in its dip beyond the said northerly side line of said Kempton Claim, and beneath the surface of said alleged Jordan Extension Mining Claim, Northern Light Mining Claim, Grizzly Mining Claim and the Fairview Mining Claim, as a lode having its top or apex in Kempton ground, and belonging there-

to as a part of said patent grant." (Record, Par. 7, pp. 26-27.)

And in Paragraph 12, (Record, pp. 29-30), it is averred: *"That every known vein or lode of metal bearing ores, earth and rock in place existing in said alleged Jordan Extension Mining Claim, the Northern Light Mining Claim, the Grizzly Mining Claim, and the Fairview Mining Claim, including the lode and vein mentioned in complainant's amended bill of complaint, and including the said Neptune Lode, has its top or apex within the surface lines of the said Kempton patented ground, and is a part of the same on their dip beyond the northerly vertical side line of said Kempton claim, and the same and every part thereof in its dip lies between vertical planes drawn downward through the end lines of said Kempton Claim protracted and so continued in their own direction, that such planes intersect the exterior parts of such veins or ledges in their dip past the northerly vertical side line of said Kempton Claim underneath the surface of said alleged Jordan Extension claim, Northern Light claim, the Grizzly claim, and in the Fairview claim, and constitute a part of the Kempton lode mining claim, and the veins and lodes patented to the grantors and predecessors in interest of defendants by the said patent of February 23rd, 1875."*

In the thirteenth paragraph it is alleged, "that said defendants, William J. Harvey and Edward Balbach, Jr., are the owners, seized in fee, in the possession and entitled to the possession, of undivided interests, and defendant Leonidas M. Lawson has a certain equitable in-

terest therein, and defendant Enos A. Wall is a lessee for years, in possession and entitled to the possession, and has also a certain equitable interest therein of the said Kempton Lode Mining Claim, U. S. Lot 55, hereinbefore described, and that since the commencement of this action, said defendant Wall has acquired, and now holds, in his own right, all the interest, estate and title therein of the said defendants, Heber M. Wells, Thomas Kearns and Junius F. Wells."

It is further alleged that there is within the exterior boundaries of said Kempton Claim, a large vein or lode of mineral and metal-bearing rock in place, containing gold, silver, etc., which has its top or apex *wholly* within the exterior boundaries of said claim, with a course or strike in an easterly and westerly direction, and parallel to, and coincident, or nearly so, with the side lines of the Kempton Claim, and that said vein, in its descent into the earth, departs from a perpendicular at an angle or dip from the horizon of about 30 deg. in a northerly direction, and on its dip passes beyond the northerly side line of said claim and passes underneath adjoining surface ground and underneath the surface of the said Jordan Extension, Northern Light, Grizzly and Fairview Mining Claims; that defendants and their predecessors in title have mined and traced said lode or vein from its apex in Kempton ground beyond said northerly side line to a depth of 350 feet, but within protractions of the end lines of said Kempton Claim, and so continued in their own direction that it intersects the part of said lode which lies between planes drawn through said end lines, that such planes intersect

the exterior part of said lode on its dip outside the northerly side line of said Kempton, and that defendants are entitled to the whole of said lode, throughout its entire depth, within protractions of said end lines and underneath the adjoining surface ground aforesaid. (Paragraphs 14 and 15, record pp. 30-1.)

Then as a separate and further defense to the bill, said amended answer (record, pp. 31-34) sets forth that the defendant Ivanhoe Mining Company is the owner in fee and in possession, and that the defendant Wall is the lessee for years and in possession of a certain lode mining claim, known as the Ashland Mining Claim (describing the same by metes and bounds); that said Ashland was patented on the 27th day of September, 1875, to the predecessors of said defendants, the Ivanhoe Mining Company and Wall; that there is a lode or vein of metal-bearing rock in place, in said Ashland claim, which is found throughout the same, being more than 900 feet in length thereof; that the same on its strike crosses the westerly end line of the Ashland and has its apex within the side lines thereof, throughout said 900 feet; that the general course of said vein is parallel to the side lines thereof, and that the defendant, the Ivanhoe Mining Company, and its lessee, the said defendant Wall, are entitled to the whole of said vein or lode on its dip beyond the vertical side lines of said claim throughout its entire depth.

Further, the amended answer alleges that said vein in its descent departs from a perpendicular at an inclination of about 70 deg. in a northwesterly direction, and in its

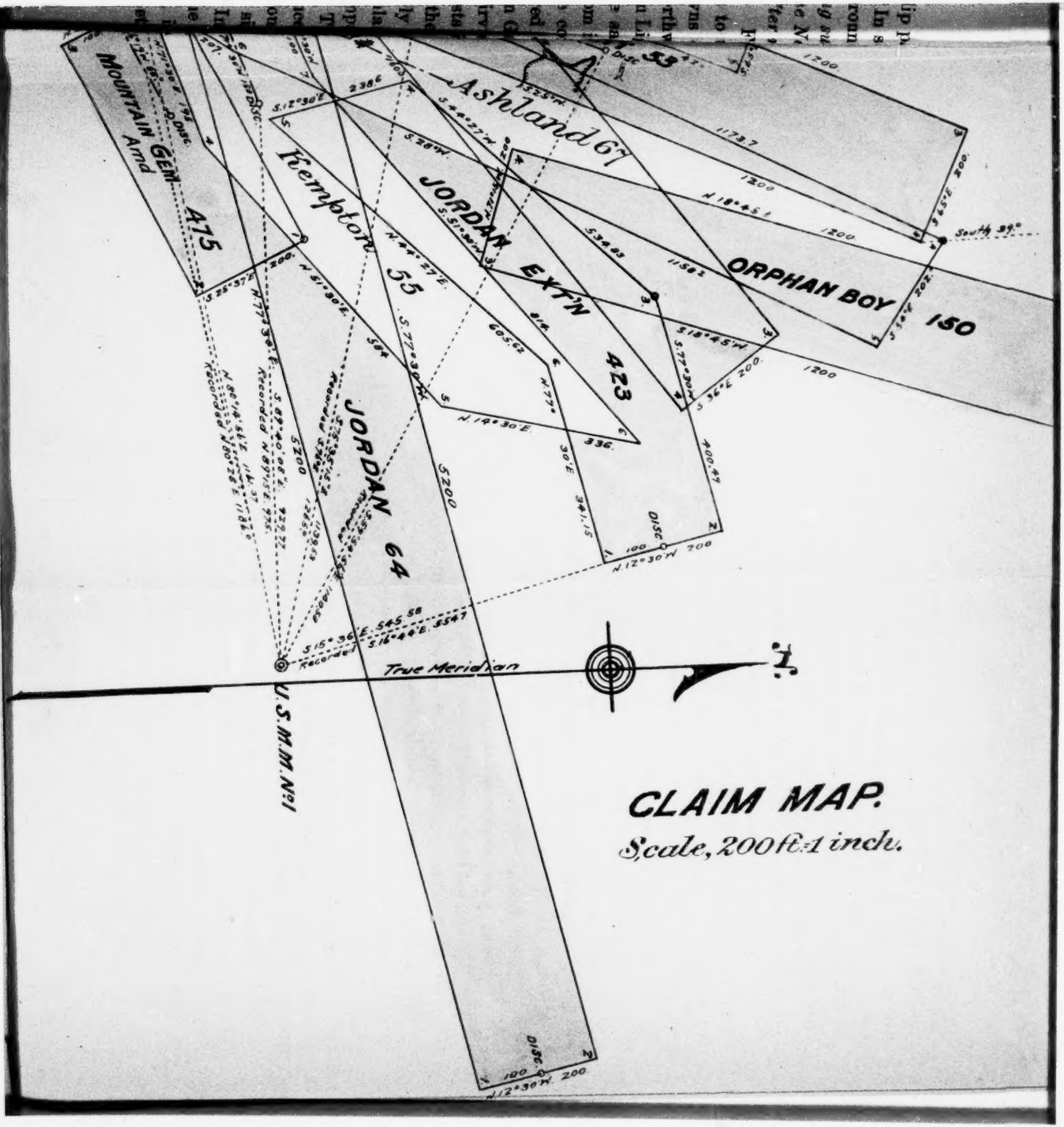
dip passes beyond the vertical side line of said Ashland: "In so much that it passes underneath adjoining surface ground * * * *and specifically underneath the adjoining surface ground known as and called the Grizzly claim, the Northern Light claim and the Fairview claim hereinafter mentioned.*"

Further, the allegations of the amended answer are as to this separate defense: First, that the complainant owns or asserts ownership in the mining claims to the northwest of said Ashland, to-wit: the said Grizzly, Northern Light and Fairview, underneath which the said lode of the said Ivanhoe Mining Company and said Wall dips from its said apex in said Ashland ground. Second, that the complainant owns or claims to own two certain alleged lode mining claims, called the Old Jordan and Mountain Gem claims, and also the Northern Light, Grizzly and Fairview claims, and defendants assert that if any vein exists in either of said claims having its top or apex within the exterior boundaries thereof, the same is an entirely distinct vein from that described as being in the Ashland and the property of the said Ivanhoe Mining Company and said Wall.

The map opposite this page is a reproduction on a reduced scale of respondent's Exhibit "Q," and shows the various claims mentioned in the pleadings and their relative situation.

In the West Mountain Mining District, in which all of the mining claims mentioned in the pleadings are situate, is found a series of alternating beds or strata of lime-stone and quartzite, which course in a general easterly

FAIRVIEW 54
GRIZZLY 52
NORTHERN LIGHT 53
N 54° E. 377
S. 54° W.
S. 54° W. 600
N 85° 17' W.
S 81° 01' W. 1713
N 25° E. 371
N 25° E.
DISC.
Mount


MOUNTAIN GEM Amd
475
Kemptom
55
JORDAN
64
Ashland 67
JORDAN EXT'N
423
ORPHAN BOY
150
5200
1200
True Meridian
U.S.M.M. No1
CLAIM MAP.
Scale, 200 ft. = 1 inch.

and westerly direction with an inclination or dip northerly, varying from 15 to 40 deg. from the horizon. As to this there is no conflict in the evidence. In one of these belts of lime-stone, all the ore bodies in controversy are found. This particular belt of lime-stone has a width or thickness varying from 100 to 200 feet, and is bounded on the southerly side by a bed or belt of quartzite, and on its northerly side by another bed of quartzite, with occasional intrusions of porphyry.

(In our discussion, we will, for convenience, designate this particular lime belt as the "Jordan Lime.")

The pleadings having been settled, the trial proceeded, and in its case in chief, respondent introduced its title to the Grizzly, Northern Light, Jordan Extension and Fairview Claims; proved the boundaries of each claim and introduced maps showing such boundaries, and the relation of such claims to the other claims mentioned in the evidence; proved it was in possession of each of said claims and working thereon; showed the existence of ore bodies lying beneath the said claims respectively, which had never been reached by the workings of any of said petitioners. Thereupon respondent rested. The petitioners then moved the court to dismiss the bill, or retaining the bill, to require respondent to commence an action at law to determine the question of ownership of the ores or veins in dispute, and in the meantime to proceed no further under the bill; alleging as the ground for such motion, first, that it appeared from the respondent's evidence that the petitioners were in possession of the disputed territory, and, therefore, a court of equity was

without jurisdiction to enter a decree quieting the title of the respondent; and, second, that a court of equity could not entertain a suit to quiet title until the question of ownership had been determined by a jury in a law action. (Record, pp. 105-106.) This motion, after argument, the court took under advisement and the trial of the cause proceeded without a jury.

The petitioners thereupon introduced evidence showing that petitioners Harvey and Balbach were the owners in fee of the said Kempton claim; that the petitioner Lawson had a certain equitable estate therein, and that Mr. Wall was a lessee for years in possession thereof; that petitioner, the Ivanhoe Mining Company, was the owner in fee of the said Ashland Claim, and that Mr. Wall was a lessee for years in possession of the same. (Record, pp. 106-138, 464-472.) Petitioners also introduced evidence as to the location and boundaries of each of said claims and of the Northern Light, Grizzly, Jordan Extension, Fairview, Jordan and Mountain Gem Claims, and their relation to one another. (Record, pp. 138-171.) And also introduced evidence in support of the allegations in their said answer, that there is a vein apexing in said Kempton claim, the course or strike of which is easterly and westerly, and claimed by their witnesses to be a bedded vein, lying in a belt of lime-stone, and conformable in dip and strike thereto. But the evidence on behalf of petitioners failed to show that this so-called bedded vein terminated in its course within said Kempton Claim. On the contrary it was clearly inferable from the testimony of petitioner's witnesses, that this alleged

bedded vein, on its strike, crossed two of the side lines of the said claim (which is an octagonal) which lines diverge in the direction of what petitioners claim to be the dip of said vein and also that on its dip or course downward it terminated before either the Jordan Extension, Northern Light, Grizzly or Fairview Mining Claims was reached, and that there was not any lode or vein found in the Kempton Claim which extended to either of the said four claims of respondent, other than fissure veins, running in a northerly and southerly direction, and each of which on its strike crossed opposite side lines of the said Kempton.

Petitioners also introduced evidence in support of their contention that there was found in the said Ashland Mining Claim a fissure vein running in a northerly and southerly direction, which, on its course and strike, and at its apex, crossed the southwesterly end line of said Ashland and continued thence on its course and strike within the side lines of said claim, for a distance of 800 feet.

(On cross-examination of their witnesses, however, it appeared that said vein did not so continue within said side lines for the distance aforesaid, but that on its course or strike, it wholly departed from said Ashland Claim, crossing the northwesterly side line thereof at a point between 500 and 600 feet northerly from the southwesterly end line thereof, and thence on its course and strike and at its apex, traversed the said Grizzly Mining Claim, crossing both of the side lines thereof.)

That this fissure vein dipped in a northwesterly di-

rection at an angle of about 70 deg. from the horizon, *and it was claimed by petitioners that all of the ore bodies lying beneath the surface boundaries of the Northern Light, Grizzly and Fairview Mining Claims, and northwesterly of the northwesterly side line of said Ashland Claim, as patented, belonged to the Ashland fissure.* All of the conflict area between the Ashland and the Kempton Mining Claims was, by the Ashland patent, excluded from the Ashland, in favor of the Kempton. (See Ashland patent and plat in supplement to record, entitled, "Stipulation and Exhibits," pp. 3-8.)

In rebuttal, the respondent introduced evidence establishing its title to the Jordan and Mountain Gem Mining Claims, by patent from the United States—the patent for the Jordan bearing date July 14th, 1877 (record, p. 306), the patent itself will be found (record, pp. 551-557), and the patent for the Mountain Gem bearing date July 18th, 1898, (record, p. 314), the patent itself will be found (record, pp. 557-560.)

An exemplified copy of the papers and records upon which said patents were issued was introduced, among which papers are the original location notices, from which it appears that the Jordan Lot 64 was located September 17th, 1863, (record, p. 307), and that the Mountain Gem was located August 20th, 1864, (record, p. 314). It appears from these exemplifications that the patents were respectively issued upon these respective locations.

Evidence was also given showing that the complainant had regularly succeeded to the title of the original patentees, of each of said claims. (Record, pp. 306-317.)

Respondent in rebuttal made the following contentions, and introduced evidence in support of each of them: (1) That the ore bodies in controversy, and all of them, belong to a single broad vein or lode of mineral-bearing rock in place, consisting of an altered, mineralized and ore-bearing belt of lime-stone, from 100 to 200 feet in width, and about 3 miles in length, bounded by a foot-wall of quartzite for its entire length, and a hanging-wall of quartzite with occasional intrusions of porphyry on the hanging-wall side, and that upon the apex of this broad vein or lode, the Jordan Lot 64 and the Mountain Gem Mining Claims are located, in such manner as to give to the said Jordan and Gem Mining Claims extra-lateral rights on said lode for the entire width thereof upon the dip, to and including the ore bodies in controversy. (2) That there was no vein or lode apexing wholly within the limits of the Kempton Mining Claim, but that what petitioners claimed to be the Kempton vein was simply a body of ore lying within and forming a part of said broad lode or vein. (3) That if such body of ore, so claimed by petitioners to constitute a vein, could be treated or regarded as such, it did not cross either of the end lines of the Kempton, but, on its course and at its apex, entered said claim across one of the side lines thereof, and departed therefrom across another of the side lines of said claim, and that said side lines diverged in the direction of the dip, thus depriving the Kempton of any extra-lateral rights thereon. (4) That the broad vein or lode of altered, mineralized and ore-bearing lime-stone did not, nor did any part thereof, on its course or strike,

and at its apex, cross either of the end lines of the said Kempton Claim, but that a portion of the width thereof, at its apex, enters across one of the side lines and departs across another of the side lines of said Kempton Claim, which lines diverge in the direction of the dip of the lode. (5) That none of the ore bodies in controversy lie in, or belong to, the Ashland fissure vein, but that all of them belong to and form a part of said broad lode or vein, apexing in the Jordan and Mountain Gem Claims. (6) That the Ashland fissure vein, on its course and at its apex, departs from said Ashland Claim, and crosses both of the side lines of the said Grizzly Mining Claim of respondent; that said Grizzly Mining Claim is senior to said Ashland and is so located that it has the superior right to any and all ore bodies—if any there were—which might lie in or belong to said fissure vein and be found beneath the surface of said Grizzly. (7) That a large portion of the ore bodies lying beneath the surface of the Fairview, Northern Light, Grizzly and Jordan Extension Mining Claims are easterly of and beyond a plane drawn parallel to the end lines of the said Kempton Claim, through a point where, petitioners claim, that the so-called Kempton vein terminates at surface on its course easterly.

It was established by the evidence that the said petitioners, Harvey, Balbach and Lawson (owners of the legal and equitable title to said Kempton Claim) had not, nor had either of them, nor had any one claiming under them, or either of them, as lessee, or otherwise, nor had any of the predecessors in interest of the said Harvey, Balbach and Lawson made any entry upon or beneath the

surface of the Fairview Mining Claim, nor any entry upon or beneath the surface of the Northern Light or Grizzly Mining Claims until shortly before the commencement of this suit, and that neither of them, nor any one claiming under them, as lessee, or otherwise, nor any of their predecessors in interest, had made any entry upon or beneath the surface of the Jordan Extension Mining Claim until within two or three years prior to the commencement of this suit, and that all work done within the last mentioned period in the said Jordan Extension was done by one Sampson, and others, as co-lessees of the Kempton, and it also appears from the testimony given by the witnesses on behalf of petitioners—if their interpretation of, and conclusions from, the physical conditions observable in the ground are to be accepted as correct—that all this work so done by Sampson and co-lessees must have been done upon a fissure running northerly and southerly, and which, on its course or strike, and at its apex, crosses opposite side lines of the Kempton Claim, so that as to such fissure the Kempton's side lines became and were end lines. And as a consequence, said Sampson, in all the work done by him under the said Jordan Extension, upon such fissure, was a mere trespasser, and prior to the commencement of the suit all work on or beneath the Jordan Extension had ceased.

It was also established by the evidence that neither the petitioner, the Ivanhoe Mining Company, nor any of its predecessors in interest in the Ashland Mining Claim, had ever entered upon the Northern Light Mining Claim, Grizzly Mining Claim, or Fairview Mining Claims,

and that no one claiming under the Ivanhoe Mining Company, as lessee, or otherwise, had ever, prior to the trial of this action, entered upon either of said claims, except its lessee, Enos A. Wall, one of the petitioners herein, and that he had never made any entry upon the Fairview Mining Claim, and had never made any entry upon either the Northern Light or the Grizzly Mining Claims until some time in November or December, 1901, a few months only before the commencement of the suit, and that as soon as plaintiff discovered that he had entered upon either of said claims, its original bill herein was filed.

And further, it appears from the testimony on behalf of petitioners that a very great portion of the work done by Mr. Wall under either the Northern Light or the Grizzly, was done after the commencement of this suit, pursuant to a stipulation between the parties permitting him to do development work.

Upon the close of the testimony, the case was taken under advisement, and on the 23rd of March, 1903, the Circuit Court made and entered its final decree, by which it was adjudged and decreed:

First: That the motion made by defendants to dismiss the bill of complaint, or that complainant be required to commence an action at law to determine the ownership of the ores or veins in dispute, be overruled and denied.

Second: That upon consideration of the pleadings and all the evidence, the bill of complaint herein be dismissed at complainant's cost. (Record, p. 539.)

No written opinion was delivered by the Trial Judge and no Findings of Fact were made. During the trial a

large number of maps and other exhibits were produced and used by the witnesses to illustrate their testimony, which maps and exhibits were admitted in evidence and the originals will be submitted to this court in connection with the record, pursuant to stipulation of the parties.

It was also stipulated that the exemplified copies of papers from the General Land Office, upon which the Old Jordan and the Mountain Gem Mining Claims were patented, shall be omitted from the record, and it was further stipulated and agreed by the parties that the Jordan Lot 64 and the said Mountain Gem Mining Claims were patented upon the location notices which are contained in the said exemplified copies, which location notices are the same as those admitted in evidence and marked Exhibits "V" and "Z" respectively. (Record, pp. 545-6.) The notice of location of the Jordan Lot 64 will be found record, pp. 307-8, and that of the Mountain Gem, record, p. 314.

From the decree of the Circuit Court dismissing the bill, complainant prosecuted an appeal to the Circuit Court of Appeals, Eighth Circuit, where the decree appealed from was reversed with directions to the Circuit Court to enter a decree for the complainant in conformity with the prayer of its bill. (See United States Mining Co. vs. Lawson, et al., 134 Fed. Rep. p. 769.)

We will attempt to review the evidence of the respective parties in the order in which it was presented, and to discuss the legal questions involved in the order in which they arose during the progress of the trial.

I.

RESPONDENT'S CASE IN CHIEF.

Respondent relying upon the well established rule that one who is shown to be the owner and in possession of a mining claim, is presumtively the owner, in the possession and entitled to the possession of all ores, etc., found within the exterior boundaries of such claim, extended downward vertically, made proof of its title to the Northern Light, Grizzly, Fairview and Jordan Extension Mining Claims, (Record pp. 39-71); verified and introduced in evidence its map, Exhibit "Q," upon which is platted the various mining claims mentioned in the pleadings, showing the boundaries of each of them and the relative situation thereof, as claimed by respondent, (Record pp. 72-105); proved that it was in possession of the said Jordan Extension, Grizzly, Northern Light and Fairview; showed the existence of ore bodies lying beneath said claims respectively; that some of said petitioners, namely, the owners of the Kempton Mining Claim, through lessees claiming under them, had, prior to the commencement of the suit, mined and extracted ores from ore bodies lying vertically beneath the said Jordan Extension Mining Claim, and that petitioner E. A. Wall, as lessee of petitioner, the Ivanhoe Mining Company, had, prior to the bringing of the suit, commenced to extract ore from ore bodies lying vertically beneath said Northern Light and Grizzly Mining Claims, and that there were ore bodies lying beneath each of said four mining claims of respondent which had never been reached by the workings of any of the petitioners, (Record pp. 102-105), and, it being estab-

lished by the answer of petitioners that they asserted an interest in, and claimed to own, all the ore lying beneath the surface of each and all of said four claims, respondent rested, believing that under the law it had, by proof of the facts aforesaid, made out a *prima facie* case, and that, nothing more appearing, it was entitled to a decree quieting its title as prayed for in the complaint.

In 1 Lindley on Mines, Section 551, 2nd Edition, it is said:

> "What are the presumptions, if any, flowing from the ownership of the surface? *Prima facie*, everything within the vertical bounding planes belongs to the locator. In the language of Judge Hallett: 'We may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own boundaries he is regarded as the owner of all valuable deposits until some one shall show a higher right.' While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, there is an undoubted concensus of opinion in support of the above rule."

The question was considered at much length and the cases reviewed by the Supreme Court of Montana, in Parrot Silver & Copper Company vs. Heinze, 25 Mont. 139 (s. c. 87 Am. St. Rep. 386).

The court announced its conclusion in the following language:

> "Under the provisions of the statute, as they have been construed by this and the other cases heretofore cited, it is only the locator, or his successor, or a patentee, who has any right to follow a vein into the boundaries of an adjoining owner,

and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath his surface. He may assert this *prima facie* title to prevent intrusion by anyone who cannot show that he comes with the right acquired by a compliance with the provisions of the statute. This conclusion is also in accord with the spirit of all the statutes regulating the disposition of the public lands, which makes it manifest that it is the policy of the Government to grant every right therein, except where express reservation is made."

In Doe vs. Waterloo Mining Company, 54 Fed. Rep., it is said in the syllabus:

"The patentee and even the mere possessor of a mining claim, under license from the government, has a right to all the minerals lying vertically beneath the surface of his claim, subject only to the right of a lawful possessor of a neighboring claim, having parallel end lines, to follow any lode, the apex of which lies within his claim on its dip within the limits of infinite planes vertically projected through such end lines."

Iron Silver Min. Co. vs. Elgin Min. Co., 118 U. S. 196;

King vs. Amy etc. Min. Co., 152 U. S. 222;

St. Louis M. & M. Co. vs. Mont. M. Co., 113 Fed. Rep. 900, 902.

At page 37 of brief for petitioners it is said:

"From these preceding statements * * * it appears that the respondent bases its claim to the ownership of the ore in controversy entirely upon an asserted ownership of the apex of the lime belt constituting the so-called broad lode, by virtue of the inclusion of a portion of the outcrop, or upper or basset edges, of that lime belt, within

> the surface boundaries of the Jordan and Mountain Gem Claims. By the bill of complainant and the evidence introduced by the respondent, it seemed perfectly clear that not only did the respondent not claim the ownership of the ore, by virtue of any title it had to the Northern Light, Jordan Extension, Fairview and Grizzly Claims, but in the complaint it is affirmatively stated that the ore bodies in controversy were contained upon its dip in a lode having its apex within the surface boundaries of the Jordan and Mountain Gem Claims. The result of this contention and this situation is, that when the respondent rested its case, it had failed to prove any title whatever to the ores in controversy."

This manifests a radical misconception on the part of counsel for petitioners, of respondent's position, of the relief sought by the bill, and of the grounds upon which respondent based its claim and right to such relief.

Respondent does not by its bill, or its evidence in support thereof, rest its right to have its title to the ore bodies lying beneath the surface of the Northern Light, Jordan Extension, Grizzly and Fairview Mining Claims, quieted as against petitioners' asserted interest or claim of ownership therein, upon any claim of extralateral rights attaching to either the Jordan or Mountain Gem Mining Claims.

On the contrary, its claim for relief is based *solely* upon the fact that it is the owner of and in possession, of said four claims, and is therefore, presumptively the owner of, and in possession of, all the ore bodies lying beneath the surface of the same.

The allegations in the charging part of the bill as to the Jordan and Mountain Gem claims, and the broad lode traversing said claims, were anticipatory, only, of the al-

leged pretention and claim on the part of petitioners, of extralateral rights on their alleged Kempton lode or vein. As we have already said, the charging part of the bill might well have been omitted altogether. Had it been omitted, it would still have been entirely competent for respondent to have introduced all the evidence which it did introduce, in rebuttal, to show that the so-called Kempton vein was not such in fact, but merely one of many ore bodies in the broad limestone lode or vein, and that petitioners had no extralateral rights on this broad vein, because, on its course or strike, it crossed two of the side lines of the Kempton claim, which lines diverged in the direction of the dip of the vein; and because the Jordan and Mountain Gem claims each include a part of the width of the apex of this broad vein, and were, and each of them was, senior in point of location to the said Kempton claim.

It is entirely clear, we submit, from the record and the order in which evidence was introduced by the respective parties, that the evidence of respondent as to the broad lode and the locations of the Jordan and Mountain Gem thereon, given in rebuttal, was introduced solely to overcome any claim or assertion of title on the part of petitioners, or either of them, to any of the ore bodies in controversy, by virtue of any extralateral rights attaching to either the so-called Kempton vein or the Ashland fissure vein. Had respondent failed to prove that the limestone belt, bounded by its quartzite walls, constituted one broad lode or vein—as is claimed in the brief for petitioners it did fail—still it would have been entitled to a

decree quieting its title to all of the ore bodies lying beneath the Jordan Extension, Northern Light, Grizzly and Fairview Mining Claims, unless petitioners succeeded in establishing that they were the owners of these ore bodies by virtue of extralateral rights appertaining to the so-called Kempton lode, or the Ashland fissure vein.

It is the petitioners—not the respondent—who are claiming these ore bodies, by virtue of extralateral rights, and they are not entitled to prevail in this cause until they have established by a clear preponderance of the evidence, that the ore bodies in question lie in a vein or veins, which apex in one or the other of their said mining claims, and also that these claims of theirs are so laid upon the apex of such vein or veins, as to secure to them extralateral rights thereon, which would embrace and include these ore bodies.

The burden of proof is upon him who seeks to go beyond his vertical boundaries and enter upon ore bodies beneath the surface of his neighbor's territory, to satisfy the court that he not only has an apex of a vein within his territory, which in its course downward extends to and includes the ores so found under his neighbor's claims, but also to establish by a preponderance of the evidence, that his claim is so laid upon such apex or outcrop as to entitle him to extralateral rights, such as would carry him to the point in dispute. In other words, to quote the language of Judge Hawley, in the case of Con. Wyoming Mining Co., 63 Fed. Rep. 540, pp. 550-551: "The owner of the surface has the right to say to all the world, 'Hands off of any and everything within my surface lines, extended downward

vertically, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner.' "

In Carson City G. & S. Mining Co. vs. North Star Mining Co., 83 Fed. 658, it is said, at page 663:

> "It is true that the burden was upon the defendant to show, by a preponderance of evidence, that the ore which it extracted from beneath the patented surface ground of the plaintiff belonged to a lode or vein, the apex of which was within the surface lines of its own patented ground."

And in Del Monte M. & M. Company vs. Last Chance M. & M. Company, 171 U. S., it is said, at page 66:

> "Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory."

Leadville Min. Co. vs. Fitzgerald, Fed. Cases No. 8158;

Cheeseman vs. Shreve, 37 Fed. Rep. 36.

In 2nd Lindley on Mines, Section 866, the author, after an examination of the cases upon the subject, says at page 1595:

> "The presumption in favor of the owner of the surface, seems to put the burden of proof upon him who claims the right to enter beneath such surface, until he shows not only that the vein in dispute has its apex outside of such surface, but also that he himself owns such apex, and in a manner not inconsistent with extralateral right to the vein in controversy. Although the surface proprietor may not himself be entitled to the vein, his possession is good as against any intruder."

II.

DID THE BILL STATE, AND DID THE EVIDENCE ESTABLISH, A CASE WHICH ENTITLED RESPONDENT TO THE EQUITABLE RELIEF PRAYED FOR?

The respondent having rested its case in chief, the petitioners moved the court to dismiss the amended bill of complaint, and petitioners now insist, as they did in the Circuit Court of Appeals, that a decree of dismissal should have been entered.

First: Because, as they contend, a suit to quiet title cannot be maintained until the complainant's title has been established by at least one action at law.

Second: Because, as they contend, upon the face of the bill it appeared, and the evidence showed, that petitioners were in possession of the property in controversy, and therefore the respondent could not resort to the equity side of the court, since it had a plain, speedy and adequate remedy at law.

To the first proposition we answer: That where the owner of land is in the possession thereof, and one out of possession asserts an adverse claim or interest therein, the owner, under the laws of the State of Utah, is not required to wait until his title has been settled by an action at law.

Section 3511 of the Revised Statutes of Utah of 1898 is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The Federal Courts will give effect to the enlarged

equitable relief provided for by this act in all cases where the land is vacant, where neither the owner nor the person asserting the adverse claim is in possession, and in all cases where the owner is in the possession of the lands.

In the case of the Central Pacific Railroad Company vs. Dyer, et al., 1 Sawyer Reports, page 641, (which was a suit to quiet title) Mr. Justice Field, speaking for the court, says at page 648:

> "The suit is evidently founded upon a statute of the State of Nevada, which declares that: 'An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.' * * *
>
> "The bill is in substance a bill of peace—its object being to quiet the title of the plaintiff, and to prevent harassing and expensive litigation from a multiplicity of suits. The jurisdiction of equity to afford relief in such cases is undoubted. The statute, it is true, enlarges the classes of cases in which the jurisdiction was formerly exercised in quieting the title and possession of real property. It dispenses with the necessity of the previous establishment of the right of plaintiff by repeated judgments in his favor in actions at law. * * * To that extent it confers upon the possessor of real property a new right, one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the National Courts will enforce in the same manner in which they will enforce other equitable rights of parties. This was held in Clark vs. Smith (13 Peters 203) where the bill was filed to enforce an act of Kentucky, which authorized a person having both the title and possession of land to insti-

> tute a suit against any other person setting up a claim to the property, and provided that if the plaintiff established his title, the defendant should be decreed to release his claim, and pay the costs of the complainant, unless by his answer he disclaimed all title to the premises, and offered to release to the complainant. 'The State Legislature,' said the Court, 'have no authority to prescribe the forms and modes of proceeding in the Courts of the United States, but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceedings on the Chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as it is in the State courts; on the contrary, propriety and convenience suggest that the practice should not materially differ when titles to lands are the subject of investigation.' ''

In the case of Holland vs. Challin, 110 U. S., page 16, (which was also a suit to quiet title) it was contended by counsel for the defendant that the bill was defective, in that the title of the plaintiff to the property had not been by prior proceedings judicially adjudged to be valid, and that the plaintiff was not in possession of the property. The case involved lands situated in the State of Nebraska. A statute of that state provided as follows:

> ''That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate.''

This court, speaking through Mr. Justice Field, said at page 18, *et seq.*:

> "The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings, not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party, but also to prevent future litigation respecting the property, by removing existing causes of controversy as to its title; and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie."

And after commenting upon the facts which were essential to the maintenance of a bill of peace or a bill *quia timet* (under the chancery practice unmodified by statute), proceeds as follows, at page 20, *et seq.*:

> "The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain a suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land

in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. * * * An action of ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character statutes, like the one of Nebraska, have been passed by several States, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the States should not be enforced by the Federal Courts, when the controversy to which it may give rise is between citizens of different States."

And at page 24:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce

> them, the party in possession or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity. * * * It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

We also cite the case of Reynolds v. Crawfordsville First National Bank, 112 U. S., page 405.

The case of Whitehead, Trustee, vs. Shattuck, 138 U. S., page 146, decides that under statutory provisions such as have been above quoted, a bill to quiet title could not be maintained in the Federal Courts where the plaintiff was out of possession and the defendant in possession, but it in no way calls in question the correctness of the decisions in the cases of Holland v. Challen and Reynolds v. The Bank, *supra*. See also the following cases:

> Prentice v. Duluth Storage & Forwarding Company, 58 Fed. Rep. 437;
> Stark v. Starrs, 73 U. S. 402;
> Gillis v. Downey, 85 Fed. Rep. 483;
> Dahl v. Raunheim, 132 U. S. 260.

In the case of Cowley v. Northern Pacific Railroad Company, 159 U. S., page 569, the Court, speaking through Mr. Justice Brown, said at pages 582 and 583:

> "Although the statute of a State or Territory may not restrict or limit an equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal Court may enforce

on their equity or admiralty side precisely as they may enforce a new right of action given by statute upon their common law side."

And the cases of Holland v. Challen, and Reynolds v. The Bank, *supra*, are cited in support of the doctrine thus announced.

See also:

Gorley v. Clark, 134 U. S. 338;
Wehrman v. Conklin, 155 U. S. 314;
Allen v. Hanks, 136 U. S. 300;
Darrah v. Wetter Mfg. Co., 78 Fed. Rep. 7.

We invite attention also to the decision of his Honor Judge Marshall, in passing upon the demurrer to the amended bill in this case, which will be found at pages 11-14 of the Record.

The case of the Boston & Montana Consolidated Copper & Silver Mining Company v. The Montana Ore Purchasing Company, 188 U. S., page 632, is cited by counsel for petitioners, and it is insisted that it was thereby determined by this court that a bill to quiet title could not be entertained in the Federal Courts until the complainant's title had been established by at least one successful trial at law.

The bill therein alleged that the defendants had unlawfully entered upon complainant's premises and had extracted from the same large quantities of valuable ores, and that they were then continuing to mine and extract ores from said premises and threatening to continue to do so unless enjoined by the court; that unless enjoined, the complainant would be driven to a multiplicity of suits, and

would be compelled to rely to a great extent on the defendants, as to the amount and value of ore from time to time extracted; and then for the purpose, as stated in the bill, of showing the jurisdiction of the court over the matters set forth in the bill, allegations were made of the defense which the defendants intended to set up or which they relied upon. The bill was dismissed by the Circuit Court for want of jurisdiction, and the question of jurisdiction was certified to this court.

And it was held that the Federal question relied upon as conferring original jurisdiction on a Circuit Court of the United States, must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up or upon which they rely. And then, on page 640, *et seq.*, the court, speaking through Mr. Justice Peckham, says:

> "It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the 'Rarus' and 'Johnstown' claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers

that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defense, however, but as establishing the complainant's right to have its title quieted."

"*But it is plain that the suit is not in truth a suit to quiet title.* There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendant's title or to anticipate their defense to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal Court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion." * * *

"If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that aspect. There are two distinct kinds or classes of bills of peace, or bills to quiet title, the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction.

"This bill evidently would come under the second class of these classes and it is defective in not containing an averment that the complainant's

> title has been at least once successfully tried at law."

What is said in the last two clauses above quoted was, we respectfully submit, *obiter dictum*. Moreover, the opinion makes no reference whatever to the cases of Holland v. Challen; Reynolds v. The Bank; Stark v. Starrs, or Dahl v. Raunheim, above cited, or to either of them.

The case is referred to and distinguished by the Circuit Court of Appeals in its decision in this cause, 134 Fed. At page 772, the Court say:

> "The case of Boston, etc. Co. v. Montana, etc. Co., 188 U. S. 632, relied upon by the appellee, is distinguishable from this, because in that case there was no allegation that the complainant was in possession, or that both parties were out of possession, and the suit was not one to quiet title, but to recover for ores extracted and to enjoin further trespass."

In Sections 177, 248 and 253, Pomeroy's Equity Jurisprudence, cited in petitioners' brief, the author is treating of the jurisdiction of a court of equity under the old chancery procedure unmodified by statute. In Sections 1396 and 1397, he deals with the enlarged equitable jurisdiction, conferred by statute such as we have in Utah.

As to the second ground upon which petitioners insist that their demurrer should have been sustained, and that the bill should have been dismissed, namely: That it appeared upon the face of the amended bill and also from the evidence, that petitioners were in possession of the ore bodies in controversy—we submit that this contention finds no justification either in the bill or the evidence.

The allegations of the bill upon this point are: That

the complainant for more than one year last past has been and now is the owner and in possession and entitled to the possession of the Jordan Extension, Northern Light, Grizzly and Fairview Mining Claims, and of all the veins, lodes and minerals beneath the surface boundaries of each of said claims, extended downward vertically, (Paragraphs 5 and 6 of the bill, record pp. 2-4); that the defendants assert and claim an interest in said ores and minerals, and give out in speech and otherwise, that they are the owners thereof, and that within two years last past, defendants, in assertion of their alleged claim and interest, have, from time to time, wrongfully and unlawfully, by means of secret underground works, entered in and upon the said Jordan Extension, Northern Light and Grizzly Mining Claims, and mined, extracted and removed large quantities of ore therefrom and converted the same to their own use. (Paragraph 7, record p. 4.)

Thus, it will be observed that according to the allegations of the bill, the respondent was the owner and in possession of the claims mentioned, and of all the ores beneath the surface of the same respectively, and that petitioners were mere trespassers thereon.

How, then, as to this question of possession, does the case stand upon the evidence, as well that elicited from the witnesses for the petitioners as that introduced by the respondent?

The only witnesses who testified on behalf of the respondent as to the work done by the petitioners, or any of their predecessors in interest, were Mr. J. Fewson Smith, a Deputy United States Mineral Surveyor, in the

employ of the respondent, and Mr. A. F. Holden, its managing director.

It appears from the testimony of Mr. Smith (record p. 74) that he had followed his business or profession in the district where these properties are situated, for about eight or ten years, and that he had been in the employ of respondent and its predecessors, as a surveyor, for about that length of time.

At pages 83-84, on direct examination, he testified as follows:

Q.—Now, I call your attention to a map which will be marked Exhibit R, showing the same underground workings on these claims. Do you know where, through these workings, any ore bodies are disclosed underneath the Northern Light?

A.—I know where the so-called ore bodies are disclosed.

Q.—Show where they are on the map?

A.—In the west of the Northern Light Mine, as I have it laid down here, between the green line S and extending southerly to the green line U. Some of them are to the west of the line ¼ of the Northern Light lot 53 and to the south of the green line marked S (f) and to the north of the green mark U.

Q.—And shown by what if any levels there?

A.—Shown on the purple, the orange, the brick red and also on the blue.

Q.—Now, are any ore bodies shown under the Jordan (should be Jordan Extension)?

A.—Yes; the so-called upper and lower stope.

Q.—Anything under the Grizzly, or would these be under the Grizzly?

A.—Well, the first described ore bodies, so-called ore bodies, would lie beneath the ground in conflict between the Grizzly and the Northern Light; yes, sir.

Q.—And would they extend into the Northern Light beyond the side line of the Grizzly here?

A.—Yes, they would, although I have limited the position by the letter "U."

Q.—Now, in the Fairview workings, you haven't reached there any ore bodies disclosed underneath the Fairview?

A.—There is ore there, but as to its body I cannot say; there is ore in the face.

Q.—There is ore in the face of the drift which extends from the side line of the Fairview in the purple drift?

A.—Yes, sir.

Q.—How do you describe this body under the Jordan Extension?

A.—I say it is called the lower stope in connection with the stope here.

Q.—They show ore bodies underneath the Jordan Extension extended vertically down?

A.—Yes, sir; Jordan Extension.

And on cross-examination, pp. 84-5, the witness testified as follows:

Q.—Whose workings are represented on that map, whose underground workings?

A.—They are the workings that had been done by

orders of somebody not in the employ of the United States Mining Company.

Q.—Well, the work that you have testified to has been done there not by the United States Mining Company?

A.—Yes, sir.

Q.—Do you know who the parties were who were in possession?

A.—I know the parties doing the work were doing it under the direction of Col. Wall.

Q.—When did you first go in there to see them?

A.—I cannot say that; at different times between now and 1899. I will state recently the works— I know that the work has been done by Col. Wall. At an earlier date it may have been done under the direction of a man by the name of Sampson.

Q.—But for the year last past, do you know that Col. Wall has been there working in Northern Light ground?

A.—Yes, sir.

Q.—And many of these works are old workings?

A.—Yes, sir.

Q.—They were there when you first took employment with the predecessors in title of the United States Mining Company?

A.—Some of them.

Q.—And were beyond the northerly side lines of the Kempton ground?

A.—Yes, sir.

This is all his testimony upon this question. He does not undertake to testify as to when any of the old work was done. And speaks of his own knowledge only as to the work done by Mr. Wall during "the past year."

(Reference to petitioners' map, Exhibit 21, will show that lying northerly of the north side line of the Kempton, and westerly of the west end line of the Jordan Extension, and easterly of the east side line of the Northern Light (as thereon located), and southerly from stations 415 and 308 on the Turnsheet Level, there is shown a considerable amount of work, and it will be noted that all this work is, according to this map, vertically beneath the surface of the Ashland Mining Claim.)

The other witness, Mr. Holden, at page 96, testifies as follows: That he is familiar with the ore bodies underneath the surface of the Northern Light, as shown upon respondent's map, Exhibit "R," and also with the ore bodies underneath the surface of the Jordan Extension and the Grizzly, and that there are ore bodies underneath the Fairview, but not shown upon the map. And then proceeds as follows:

Q.—Who, if anybody, has been working upon those ore bodies within the last year?

A.—The ore bodies on this map shown from the purple level up to the green level have been worked, a portion of those workings have been run by Colonel Wall and his associates.

Q.—During the last year?

A.—During the last year.

Q.—And what have they done in the way of extracting ore?

A.—They were extracting ore and shipping it.

Q.—In what quantities?

A.—In considerable quantities; I think there is about a thousand tons all told, probably.

Q.—A large quantity?

A.—Yes.

Q.—That they took out and shipped?

A.—Yes, sir.

Q.—Prior to the beginning of this suit?

A.—Prior to the beginning of this suit.

Q.—And would that be so with reference to the ore bodies in the Jordan Extension?

A.—There was some ore taken out by Col. Wall altogether; he took some; and there were other leasers of the Kempton property took other ores.

Q.—And would that be so also with reference to the ore bodies that extend beyond the south side line of the Grizzly into the Northern Light?

A.—Yes, sir. I am not sure that there has been any ore or very little ore taken—I think most of the work is old work.

Q.—There appears to be an upraise here; is that in ore?

A.—There is ore there.

Q.—Leading from the green level into this triangular piece of the Northern Light?

A.—Yes, sir.

* * *

Q.—Do you know whether or not at the time this suit was brought they were working upon those ore bodies, taking out ore?

A.—They were.

And on cross-examination, at page 97, the witness

stated that the workings of the Kempton shown upon the map, extended from the surface to the lowest level of the Kempton works, and on redirect examination, page 97, he testified as follows:

Q.—When did this work that you have been speaking of begin the last time?

A.—It began in various—there is considerable work here that has been done within the last three years by Sampson and others, who were leasers from the Kempton people, and a portion of it has been done by Col. Wall and a portion of it was old work that has been there many years.

Q.—Within what period has that work been done?

A.—Which work?

Q.—This last work?

A.—Within a year; Col. Wall's work has been done within a year and embraces *nearly all if not all of the work* that is under the Northern Light and the Grizzly.

Q.—Prior to that you say that Sampson did some work where?

A.—Sampson did some work partly under the *Jordan Extension* and partly under the *Kempton.*

Q.—But did not extend out under the Northern Light?

A.—Did not extend out under the Northern Light.

Q.—And prior to that time when was the last work done?

A.—There have been some leasers off and on. I cannot recollect when the work was done in the Ashland tunnel, the yellow tunnel to the left of the map.

Q.—Reaching out as far as the Northern Light?

A.—No; I don't think it reached out to this ore body.

Q.—Well, prior to this work of Sampson's when was the last work done underneath any of these claims?

A.—Oh, it was many years ago.

Q.—Many years ago?

A.—Yes, sir.

Q.—Outside of these workings?

A.—That is, as far as I know there have been no workings under them for many years so far as I know. * * *

Q.—Now, you spoke about there being Kempton workings. Is this Neptune Kempton tunnel here a Kempton working owned by the Kempton?

A.—No; that is owned by the United States Mining Company.

Q.—Where did they begin on that?

A.—There has been ore shipped from the mouth right in as far as the southeasterly side lines of the Kempton.

Q.—Has it been in the possession of the United States Mining Company?

A.—Been in the possession of the United States Mining Company and its predecessors.

And on cross-examination, pages 98 and 99, the witness states that this tunnel was located by the owners of the Neptune in 1871; that the Neptune was abandoned, and further states that the Neptune and Kempton were practically identical claims (meaning, we suppose, that the Kempton covered practically the same ground that was formerly covered by the Neptune). And proceeds as follows:

Q.—Is it not a fact, Mr. Holden, that this Neptune

tunnel was located in 1873 for the purpose, as expressed in the notice, of developing the Neptune lode; don't you know that was expressly stated?

A.—That was expressed in the location notice.

Q.—Is it not a fact that the people who held the Kempton have used that tunnel nearly thirty years?

A.—No, sir; not quite. I have been in possession of, —the Old Jordan Mining and Milling Company and the Old Jordan and Galena Company, and the United States Mining Company have been in the exclusive possession since 1884 of that tunnel.

Q.—You blew it up with dynamite some time ago, did you not?

A.—Yes, a portion of it.

Q.—What did you do that for?

A.—To prevent trespass by men who were wrongfully there and who refused to stop.

Q.—Do you say you own that tunnel because it runs through Mountain Gem ground?

A.—Because it was abandoned and we have pushed it under another claim called the Excelsior and Mountain Gem and Jordan.

* * *

Q.—When was it abandoned?

A.—I cannot say, but from 1884 down to the present time there was no work done in it and I have been in possession of it.

Q.—You think you have been in possession of it?

A.—I know it. I have had charge of it.

Q.—Who has been working through that tunnel in these workings; anybody?

A.—In what period?

Q.—Any period?

A.—I don't know when all the works were made. The first workings were made—they were there probably many years before I was acquainted with the tunnel.

Q.—Why, Mr. Holden, all these underground workings here have been made through this tunnel, this Neptune tunnel?

A.—All of them; no, sir.

Q.—Then through what other opening?

A.—Nearly all the workings shown on that map and the old workings were made through three incline shafts, only one of which is shown here, and they were there when I first knew the Neptune Kempton ground. Three inclines shown coming to the surface. There was a hoisting works upon the ground when I first saw it, at least there was some building there; but much if not the major portion of that work was done through the hoisting works.

Further, on pages 99 and 100, the witness, still under cross-examination, testifies that Col. Wall has been using the tunnel for about a year, under a stipulation between the parties.

And then proceeds:

Q.—He has used it all the time he has been in possession of it and using it yet?

A.—Yes, sir.

Q.—In his operations on the Kempton mine?

A.—He is using it under a stipulation with me by

which we allow him to use it—a stipulation between the attorneys. It was with my consent that the stipulation was entered into.

(It appears that in another action between the same parties, which is still pending, involving the question of title to this tunnel, that both parties have been enjoined from interfering with it, and notwithstanding such injunction the defendants have been permitted to carry on development work preparatory to the trial of this cause.) See pages 99-103, inclusive.

And at page 102 the witness testifies as follows:

Q.—I will ask you if under the Fairview there is any known ore body which is still existing there anywhere *and which has never been reached by the defendants or any of them?*

A.—There is. * * * It is indicated in the yellow level near station 876 marked in red ink, and the surrounding workings. There is a large body of ore.

Q.—These are the workings of the plaintiff company?

A.—They are the workings of the United States Mining Company.

Q.—Vertically beneath the surface of the Northern Light is there any known developed ore body now existing which has never been reached by any of the workings of the defendants?

A.—A portion of the same ore body I spoke of is under the Northern Light also. * * * Where I hold my ruler, above the cut marked second cross-cut.

Q.—Vertically beneath the surface of the Jordan Extension, is there any known and large ore bodies which

have never been reached by any of the workings of the defendants?

A.—There are two or more, one marked in the Holden Raise on this map. This section right here is a large ore body which has never been reached by the defendant.

• • •

Q.—Now, how much of this ore body to which I am pointing which is beneath the Grizzly around near stations—well, that yellow ore body in which the elevation is given as 1259.9, and around in that neighborhood, has been opened since this suit was commenced, opened by the defendant, notwithstanding the injunction, under a stipulation between the parties to this action permitting development work to be done?

A.—There is about 400 feet—between three and four hundred feet; about nearly four hundred feet of that work has been done they claim under an agreement with me.

Q.—Permitting development work to be done. And that work is in ore?

A.—That work is in ore.

Q.—And developed ore that was unknown at the time of the commencement of this action?

A.—It was not shown at the time the action was commenced.

Q.—When did Mr. Wall and his associates first commence work anywhere under the surface of any of these claims?

A.—Something less than a year ago.

• • •

Q.—So that the action was commenced since you learned that they were under your ground?

A.—I had the suit started as soon as I knew they were under the vertical boundaries.

Q.—Under the Grizzly. I omitted to call your attention to that. Is there now a known ore body vertically beneath the surface of that claim other than the one to which I called your attention, which has never been reached by any of the workings of the defendant?

A.—There is.

And Mr. Holden, in his cross-examination, when called in rebuttal, testifies at pages 352-3 as follows:

Q.—When did you first discover that the Kempton and Ashland Mines were on this lode (meaning the broad lode)?

A.—I believed that they were on this same lode for some years.

Q.—When did you first make the discovery?

A.—I should say that I formed the opinion that they were on this lode, oh, fourteen or fifteen years ago.

Q.—And you have known for that many years and more that the parties had been working there and taking out ore?

A.—No; not all that time.

Q.—Well, off and on during that time?

A.—Very seldom anybody worked there.

Q.—They have been taking out ore, have they not, for the last fourteen or fifteen years?

A.—I think they have taken a good deal of ore *from the surface, and the old dump was removed, and they were working around on the surface off and on for a number of years.*

Q.—It is only lately that their right to continue to mine there was called in question?

A.—I will have to ask you to state where; you say there.

Q.—In the mine, in the Kempton Mine or in the Ashland?

A.—If you mean in the Ashland, I think their right was never questioned by me, to mine in the Ashland Mine; if you mean working in the Kempton, they have never worked there without my consent for eighteen years, in the lower workings.

Q.—You have not called in question their right to mine there until recently, have you; you haven't brought any suit?

A.—No; I did not bring any suit.

Q.—Nor the predecessors in title of the United States Mining Company?

A.—They did not.

Q.—Did not. It was open and notorious that these parties and their leasers and other parties were working in there, was it not?

A.—I can say for the last fourteen years, if they had ever resumed work there to any appreciable extent, I should have stopped them, as I did stop them as soon as I did know they were working in that country.

From the foregoing evidence, which was all upon this subject that was given on behalf of the respondent, it appears: That many years ago, prior to 1884, the Kempton owners, or those claiming through them, had been prosecuting work, but where, whether all of it was done within

the boundaries of the Kempton Claim and that part of the Ashland lying immediately north of the northerly line of the Kempton, and west of the westerly end line of the Jordan, and east of the easterly side line of the Northern Light, and south of said stations 415 and 308 on the Turnsheet Level, does not appear; that then for many years all work had been abandoned; that about three years before the trial was had, work was commenced by one Sampson and others, who, as lessees, did some work under the Kempton and Jordan Extension, but not under either of the other four claims of complainant; that thereafter and within a year prior to the trial, petitioner Wall and associates had done some work, *which embraces nearly all if not quite all* the work ever done either by the owners of the Kempton, or their lessees, or by the Ivanhoe Mining Company, or its lessees, on either the Northern Light or the Grizzly Claim. And moreover it appears that as soon as it was discovered by respondent that petitioner Wall and associates were working beneath the surface of any of these four claims, this suit was commenced. It also appears that a very large portion of this work done by Wall was done after the suit was commenced, under a stipulation by which he was permitted to do development work in preparation for a trial of the cause.

It is also seen that at no time have the petitioners, or any of them, or any one claiming through or under them, or either of them, done any work at any point on or beneath the Fairview Mining Claim.

It further appears that at the time the case was tried, there were large ore bodies beneath the surface of the Jor-

dan Extension which had not been reached at all by any work done by the petitioners, or any of their predecessors, and that the same is true as to ore bodies beneath the surface of the Northern Light and Grizzly.

As the case stood, when respondent rested its case in chief, it appeared that plaintiff had a perfect legal title to the Jordan Extension, Northern Light, Grizzly and Fairview Claims, and was in possession of and working on the vein therein; it did not appear that the petitioners had any title or right of possession whatever; for aught that appears they were mere intruders, wilful trespassers, and our contention was that every entry made by them, or their predecessors, was a separate and distinct trespass; that when Sampson ceased his work and left the premises, for instance, his act of trespass ceased, and the possession of the respondent was then undisturbed in any way until the petitioner Wall re-entered as hereinbefore shown.

Now, before reviewing the evidence on behalf of the petitioners as to this question of possession, we wish to be understood that we concede the propositions stated on page 188 of the brief for petitioners, namely: That whoever is in possession of the apex of a lode, or of any part of it, is in the actual possession of every extralateral part of the lode, which possession of the apex legally secures.

We admit that if petitioners had succeeded in proving that there was a vein or lode, having its apex in the Kempton Claim, and that the Kempton was so laid upon this apex as to entitle the owners of the claim to extralateral rights, they, being in possession of such apex, would be deemed in law to be in possession of the vein

throughout its entire depth, between planes bounding such extralateral rights.

We make a like admission, of course, as to the Ashland. But this is not the question which we are now discussing. For had petitioners shown that they were entitled to the ore bodies in controversy, by virtue of extralateral rights given them upon the alleged Kempton lode and the alleged Ashland lode or vein, they would, of course, be entitled to a decree in their favor herein, although none of them had ever made any entry whatever on or beneath the surface of either the Jordan Extension, Northern Light, Grizzly or Fairview Mining Claims.

(We trust when we come to a discussion of another branch of the case, that we will be able to show that petitioners fai[illegible] to make a case which would entitle them to any extra[illegible]eral rights, either on the so-called Kempton vein or the Ashland fissure vein, which would include any of the ore bodies in question.)

The question here under consideration is whether or not the petitioners had without right and unlawfully acquired such possession of the ore bodies involved, or any of them, as would preclude respondent from successfully maintaining a bill to quiet its title thereto.

It cannot be claimed, of course, that if petitioners were not entitled to any extralateral rights, their possession would extend to anything beneath the surface of the Jordan Extension, Northern Light, Grizzly or Fairview Mining Claims, until they had actually so extended their workings as to reach the same. And even when they had done so, their possession would not extend beyond the point of

the pick, the face of the drift, or other opening. And even as to that, it would be unlawful—the possession of a mere trespasser or intruder, and the moment they withdrew therefrom, the true owner, being in possession of a part, would be deemed to have the actual, not merely the constructive, possession of every inch of his territory.

Let us now turn to the evidence on the part of petitioners, as to the fact of possession.

Mr. Heber McNeill, at pages 277-8-9, testified that he knew the Kempton Mine and the Ashland Mine; that he had known the Kempton since November, 1884; that he had worked there the latter part of November, 1884; that he worked from that time on for about four years and a half off and on, pretty nearly all the time for four years and a half, and then he didn't do any more underground work there until July, ~~1888~~ 1878, and has been there ever since, except a month and a half.

Q.—Now, going back to the year 1884, I will ask you if, at that time, you did any mining upon the surface of the Kempton?

A.—Yes, sir.

Q.—What on?

A.—We mined between the Kempton incline and the old Neptune incline on the surface. We mined ore there. The poorest of it we put on the dump, and the balance was shipped as first class ore. We mined there from along in June until the snow drove us out in the fall, on the surface.

Q.—What was the extent of the outcrop of the ore there when you commenced to mine?

A.—At the Kempton incline it was about five feet and as we went towards the Kempton, going west, it widened out to twenty-five feet, if not more.

Q.—The outcrop of the ore upon the surface?

A.—Yes, sir; the outcrop of the ore on the surface at places where the company had worked. The pillars were left, of ore that had been taken out in some places where we worked them out.

(It will be noted that the witness says nothing about ever having done any work beneath either of the four claims of respondent.)

Mr. Lemuel Colbath, at page 159, testified that in 1873 the owners of the Kempton were working at and near the surface of the Kempton Claim, where the ore outcropped; that the witness parted with all his interest in the property in the spring of 1874; that at that time the owners of the Kempton had worked to a depth of about 100 feet, which carried them to a point at or near the northerly side line of the Kempton Claim; that since he parted with his interest in 1874, he had been over the ground and had observed work being done by the defendants, petitioners' predecessors.

(Neither does this witness testify to any work ever having been done by the petitioners, or any of their predecessors, under either of the four claims of respondent.)

As already appears from the testimony of Mr. Holden, Mr. Sampson and associates, as lessees of the Kempton, did some work beneath the surface of the Kempton and the Jordan Extension Mining Claims, within three years prior to the trial of the case. We have said in our state-

ment of the case that Sampson and his co-lessees ceased work there before the commencement of the suit. This is made apparent by petitioners' Exhibit 16, pages 132-134. This is a lease from petitioners Wm. J. Harvey and Edward Balbach to Junius F. Wells, of the Kempton Mining Claim, for the term of four years, from the 1st day of August, 1901. There is no evidence that this lessee, Wells, ever did any work anywhere beneath the surface of either of respondent's four claims.

Now, it is shown by petitioners' Exhibit 17, record pages 135-6, that the petitioner, Enos A. Wall, first became interested in the Kempton, as lessee, or otherwise, on the 6th day of November, 1901, at which time the said lessee, Wells, assigned, as shown by said exhibit, to Enos A. Wall, a one-half interest in his (Wells') lease aforesaid, and the said Enos A. Wall thereby agreed to take the general supervision and management, without charge, for his personal services, of said property, to enter into and operate the same in a proper manner and at his own expense. It must be concluded, we take it, from this agreement, Exhibit 17, and the absence of any evidence to the contrary, that petitioner Enos A. Wall did not do any work whatever as lessee of the Kempton, prior to the date of this agreement.

Now, as to the Ashland Claim. It is shown by petitioners' Exhibit 10, record pp. 122-3, that on the 15th of August, 1900, the petitioner, the Ivanhoe Mining Company, leased the Ashland lode and mining claim to H. O. Bemis and Adolph Jessen, for a term ending December 31st, 1901. And from petitioners' Exhibit 11, record pages

123-4, it appears that this lease was, on the 10th day of December, 1901, extended to the 31st day of December, 1902. And from petitioners' Exhibit 13, record pp. 126-7, it appears that the said Bemis and Jessen, on the *17th day of February, 1902*, sold and assigned their said lease to petitioner Enos A. Wall. So far as the record discloses, this is the date when Mr. Wall first acquired any interest in the Ashland Mining Claim, either as lessee or otherwise. It was but two days before the commencemnt of this suit. All work which the petitioner Wall caused to be done upon what is now claimed by petitioners to be the Ashland Vein, prior to the date last aforesaid, was done by him as lessee of the Kempton, and in the belief on his part that the ore there found was within the so-called bedded vein of the Kempton. This is shown by the testimony of Mr. Wall, record pp. 287-292-295-297-298.

Now, it is not claimed that petitioner Wall ever did any work on or beneath the surface of the Jordan Extension.

What work has been done by him under either the Northern Light or the Grizly Claim? And when?

It appears from the testimony on the part of the petitioners that the work marked "west drift" running westerly from station 606 in the Ashland Tunnel, shown on their map Exhibit 21, and colored "blue," was run in December, 1901. (Heber McNeill, record p. 282.) And at page 267, Mr. George Hannas testifies that this was about their first work. (This work, according to said Exhibit 21, commenced on the southeasterly side line of the Northern Light.)

Enos A. Wall—referring to another west drift, shown on said Exhibit 21, being on the lowest level, and colored "red"—testifies (record p. 291): That all of this drift, from station 512 to station 517, was run by him since the October preceding the trial, and prior to the following July. (Station 512, where this work commenced, was not within either of respondent's four claims.)

And referring to the Turnsheet level, shown on said Exhibit, he testifies at page 291 that this level was extended by him from station 414 to its westerly end at station 420, prior to July, 1902. It will be observed that the point where he took up this work is not under either of said four claims.

And at pages 292-3—referring to the Ashland No. 2 Tunnel, shown on same exhibit—he testifies as follows:

Q.—Had you been in the Ashland No. 2 Tunnel for any distance prior to July of this year?

A.—Yes; to the fissure.

Q.—It has been driven *since July* some distance?

A.—Yes, considerable.

Q.—When was it driven; from what to what stations? Where I hold my pointer?

A.—From somewhere near that bend.

Q.—That would be station 713. Driven from there out to the present face, and then this little cross-cut had been driven to the west since July of this year?

A.—That is true—I don't know—since July?

Q.—Since July?

A.—I am not certain as to the date when the work was commenced upon that, but certainly recently.

Q.—And from the time whatever it was; the time that work was commenced there, there was no interruption?

A.—Until interrupted by proceedings in court.

And on re-direct, at page 297, he testifies as follows:

Q.—It is a fact, is it not, since the commencement of this action, and since the service upon you of the writ of injunction, that under an agreement you have done work in the mine there for the purpose of exploration and for the purpose of evidence and proof?

A.—Very considerable, very considerable.

Now, as to the work done by Sampson and his co-lessees, under the Jordan Extension, within two or three years before the trial of this cause. It will be made manifest when we come to discuss the evidence on behalf of petitioners, and upon which they rested their claim to extralateral rights on the so-called Kempton Claim, that their witnesses claimed that the ore bodies encountered in these openings beneath the Jordan Extension, were in, belonged to, and were a part of, the Sampson fissure vein. That which they call the Sampson fissure is so marked and designated upon their map, Exhibit 21, reference to which will show it is thereon represented as having a course northerly and southerly, crossing on its strike the northerly side line of the Kempton, and on its course continuing thence into and beneath the Jordan Extension, to the stopes marked "lower stope" and "upper stope," which connect with the lowest level in the mine, near the junction of the "east drift" with the "west drift," shown upon said exhibit in red. Their witness, Mr. Hannas, says at page 269, that these two stopes are on the Sampson fis-

sure. And that it was here that Sampson and his colessees worked beneath the Jordan Extension appears from the testimony of Mr. Wall, at page 291.

Q.—Prior to July of the present year, had you been through any of the ore bodies lying in the Sampson fissure?

A.—Only where the workings of Mr. Sampson were suspended, when they ceased below the level.

Q.—Where? Below the level of the tunnel?

A.—Below the level of the tunnel and at a point outlined here at that stope.

As will be shown when we come to discuss petitioners claim of extra lateral rights, their witnesses say that this Sampson fissure crossed on its strike opposite side lines of the Kempton Claim. Clearly, therefore—if the testimony of petitioners is to be accepted as the true interpretation of the geological facts or features—the owners of the Kempton had no right to follow this fissure vein beyond the northerly side line of this claim, and when Sampson and his associates did follow it on its strike beyond and into the Jordan Extension, they were guilty of a gross, an unmistakable, trespass, and when they abandoned work thereon—when this trespass ceased—respondent's possession, even as to the openings thus unlawfully made, was again undisturbed.

It also appears from their testimony that a great deal of the work—shown on their map, Exhibit 21, as being north of the Kempton, west of the westerly end line of the Jordan Extension, east of the easterly side line of the Northern Light, and southerly from Stations 414 and 308

in the Turnsheet Level—is very old work. (See testimony of Mr. Smith, record, pp. 251-252; Mr. Hannas, 265.)

There is not any evidence to show that any of this work was done within recent years.

We believe we are justified in saying that the foregoing is all of the evidence on behalf of petitioners bearing on the question of possession. In no particular does it controvert the testimony given by Mr. Holden. It appears therefrom that no entry was made by petitioners, or by any of them, upon the Jordan Extension, after Sampson abandoned work therein, which, as already shown, must have been as early as August 15th, 1901, (when the Kempton lease was given to Wells), or more than six months prior to the bringing of this suit; it also appears therefrom that none of the ore bodies beneath the Northern Light or Grizzly had been entered upon prior to November, 1901, or about three months before the commencement of this suit, and that the greater part of the work done beneath either the Northern Light or the Grizzly, by petitioner Wall, was done after the injunction was served, with the consent of, and under the stipulation on the part of, respondent.

It furnishes a poor basis for the claim made in petitioners' brief that "All of the tunnels, shafts, inclines and drifts (shown on Ex. 21) connect with the ore vein at its outcrop in the surface in Kempton and Ashland ground, and had been made and occupied by petitioners and their predecessors in interest for more than thirty years before the commencement of this action."

And again, that the Mountain Gem Claim was called

from the grave: "In order to make it the foundation of an attack on titles long vested, upon properties mined for more than 29 years at great expense, and with the result that these expenditures had been rewarded by the disclosure of the existence of large and valuable ore bodies."

Our contention as to the law is, that the owner of a legal title, being in possession of a part of a tract of land, is, in contemplation of law, in possession of everything within its exterior boundaries, except as to such part only as he may have been actually ousted from; that the legal title and possession of a part draws to it the possession of the whole, except to the extent that there may have been an actual adverse possession by some other party; that the possession of an intruder, or one without title, or of one even who enters under color of title, is not extended beyond his actual enclosure, or that of which he has taken actual physical possession as against the true owner who is in possession of a part. The possession of a mere trespasser, or even of one entering under color of title, on a lode or vein, who has engaged in the extraction of ore therefrom, cannot be extended beyond the point of his pick, the face of his drift, or other actual opening made by him, as against the true owner who is also in possession.

> "Title to land draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual adverse possession; and while he is in actual possession of a part of the premises, he has contructive possession of the remainder, and can be ousted by a mere intruder only to the extent of the actual occupation of such intruder; and no entry by an intruder un-

der color of title to the whole tract can give him a constructive possession which would oust or supersede the constructive possession of the real owner."

Labory vs. Orphan Asylum, 97 Cal. 270.

In Clark vs. Courtney, 5 Peters 319, it is said at 354-5:

"If a mere trespasser, without any claim or pretense of title, enters into lands, and holds the same adversely to the title of the true owner, it is an ouster or disseizin of the latter, but in such case the possession of the trespasser is bounded by his actual occupancy, and consequently the true owner is not disseized except as to the portion so occupied. But where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed to be disseized to the extent of the boundaries of such deed or title. This, however, is subject to some qualifications. *For, if the true owner be, at the same time, in possession of a part of the land, claiming title to the whole, then his seisin extends by construction of law to all the land which is not in the actual possession and occupancy, by enclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain; both parties cannot be seized of the same land at the same time under different titles, and the law therefore adjudges the seisin of all, which is not in the actual occupancy of the adverse party, to him who has the better title.* This doctrine has been on several occasions recognized in this court. In Green vs. Liter, 8th Cranch, the court said the general rule is that if a man enters into land, having title, his seisin is not bounded by his occupancy, but is held to be co-extensive with his title; but if a man enters

> without title, his seisin is confined to his possession by metes and bounds. Therefore, the court said, that as between two patentees in possession, claiming the same land under adverse titles, he who had the better legal title was to be deemed in possession of all the land not included in the actual close of the other patentee."
>
> See also Hunnicut v. Peyton, 102 U. S., p. 333; see page 369.

The rule, or doctrine, announced in the foregoing cases applies also to a case in which is involved the question of ownership or possession of a mining claim and the ores beneath the same, and the respondent having title to the Jordan Extension, Northern Light, Grizzly and Fairview, and being also in possession of the surface and portions of the underground works and ore bodies in said claims, is deemed to be in possession of every part and parcel of each of the claims, including all the ore bodies therein, except so far only as the evidence might show it had been actually ousted by petitioners.

Here, we submit, there is nothing to show an ouster of the respondent by petitioners, from any part or portion of either of said claims, or of any ore body lying beneath them, or either of them. As was said in Clark vs. Courtney, *supra*, "The law will not presume an ouster without some proof; and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseized, yet the latter is not bound to consider a mere act of trespass a disseizin."

We submit that under a state of facts such as we have here to deal with, a suit in equity to quiet title is the only

adequate remedy. What action at law could be maintained? Our friends upon the other side may say, "Trespass." But the reply is, that one cannot maintain an action of trespass against another, who is in possession of the property alleged to be trespassed upon.

If in this case we have such possession as would enable us to maintain an action of trespass against petitioners, then we have the requisite possession to maintain our suit in equity to quiet title. That we have such possession as would entitle us to maintain trespass, is shown by the Flagstaff case. Mining Company vs. Tarbet, 98 U. S. 462. That was an action, as stated by the court, in the nature of trespass *quare clausum fregit* to recover damags for ores extracted from a lode in which both plaintiff and defendant were working. Damages were recovered in a large sum, and no question seems to have been made as to the right of the plaintiff to maintain the action on the ground that the defendant was in possession. The question was distinctly raised in Montana Mining Company vs. St. Louis M. & M. Company, 102 Fed. Rep., page 430, which was an action in trespass brought by the St. Louis Company against the Montana Company to recover damages for ores extracted by the defendant from a portion of a lode claimed by the plaintiff. In the appellate court it was contended by the plaintiff in error that the lower court erred in refusing to instruct the jury as requested by plaintiff in error that the defendant in error was not in such possession of the vein as to maintain an action of trespass. The court says:

"It is urged that the possession of the apex of the

> vein on the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such possession is not constructive, but actual. (See also:—Badger Mng. Co. v. Stockton Mng. Co. 139 Fed. Rep. 838)

But notwithstanding respondent is in possession of the property in controversy and, therefore, could maintain an action of trespass, yet such action would be entirely inadequate to redress the wrongs complained of. This was expressly ruled by his Honor, Judge Marshall, in passing upon the demurrer to the amended bill, where he said:

> "The demurrer for the purpose of this hearing admits the facts well pleaded in the amended bill. The plaintiff is alleged to be in the possession of the premises in question. It then has no remedy in ejectment. *In an action for trespass, the title would probably be drawn incidentally in question, but the right determined would be limited to the place trespassed on, and, indeed, the record would not show that the title was determined. In a case of this kind, the remedy afforded in an action of trespass is not so adequate as that to be obtained in an equitable suit to quiet title.*" (Record p. 12.) Mining Co. vs. Mining Co., 5 Utah 3.

The Circuit Court of Appeals for the Ninth Circuit, in a very recent case, has decided the precise question here involved in accordance with our contention.

> Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 121 Federal Reporter 973.

In this case an action was brought by the plaintiff (appellee) against the defendant (appellant) to quiet its title to the Stemwinder lode, including its extralateral right. It was alleged in the bill that the plaintiff was in possession of the claim within whose limits there was a mineral bearing lode, the apex of which ran through the said claim and across the end lines thereof, and that it extended downward to the westward beyond the side lines of the claim; that the defendant claimed an interest adverse to the plaintiff in that part of the lode lying outside and beyond the vertical plane of its side lines, and that the *defendant was extracting and threatening to extract valuable ore bodies therefrom.*

It will be seen that the bill is in substance identical with the bill in the case at bar. The defendant demurred on the ground that it appeared that the defendant was in possession and that therefore an action at law would lie. The Circuit Court of Appeals held otherwise, saying:

> "It is true that by an action of ejectment the appellee might have determined the question of its title and right to the possession of that particular portion of the ledge upon which the appellant is alleged to have trespassed. But that relief is not all that the appellee is entitled to, if the averments of the bill are true. The suit is brought to determine the adverse claims of the appellant as to the whole of the ore body lying between the planes of the appellee's end lines projected beyond the extralateral rights of the Last Chance. In answering an action of ejectment, the appellant would have been required to set up only its claim of right and title to the ore body at the particular spot where it had taken possession. The judgment would have left undetermined the

> question of its right to other portions thereof. That it in fact asserted adverse claims to other portions is shown by its answer in this suit, in which it set up ownership of several claims located along the lode northwestward from the Last Chance claim, the extralateral rights of which would, but for the Stemwinder location, include separate portions of the ore body the title to which the appellee seeks to quiet. No remedy would be adequate unless it quieted the title of the appellee to the whole subject of the controversy. As was said in Kilbourn v. Sunderland, 130 U. S. 506, 514: 'The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.' "

It was suggested by counsel for petitioners in the trial court that our remedy would be trespass to try title. We answer that no such action is provided for by the laws of Utah. One may recover damages in an action of trespass of course, but such action does not necessarily involve the title at all. It involves, necessarily, only the present right of possession, and if the title were put in issue, it would, only, necessarily, determine the title to the particular locus upon which the trespass was committed. Trespass to quiet title, such as is recognized in Texas and some few other States, is unknown here.

We might, as suggested in the case of Clark vs. Courtney, *supra,* elect to treat petitioners' acts of trespass as a disseizin and proceed in ejectment, but, as there pointed out, we are not bound to treat ourselves as disseized. Should we do so, however, the remedy in such action would be as imperfect and inadequate as would

the action of trespass. We could not truthfully allege in a complaint in ejectment that we had been ousted from either of the claims or from the lode therein, for the truth is, as appears from our own evidence, that we are in possession of each of those claims under the true legal title thereto. We could not truthfully allege that we were ousted from any part thereof by petitioners beyond such part, such places, as they had actually trespassed upon. Should we in a complaint in ejectment allege that we had been ousted by petitioners from either of the four claims, or that we had been ousted from the entire lode underlying these claims, petitioners could safely challenge us to show an ouster (even under our right to elect to consider ourselves disseized by the trespasses complained of) beyond the several openings made by them in or upon the ledge. Were a complaint in ejectment to allege that the plaintiff was the owner of a given tract of land, and in possession of a part thereof, and entitled to the possession of the whole, and that defendant had entered upon and ousted plaintiff from a portion of said tract, describing the same, and that such unlawful entry was made by defendant under a claim of ownership and right of possession to the entire tract, with a prayer that plaintiff recover from defendant the entire tract, it would be an anomaly in pleading, and could not successfully stand the test of a demurrer.

Suppose, then, that we should elect to treat ourselves as disseized by petitioners, so far as their drifts, levels and other openings extend, and bring ejectment for the recovery thereof and prevail therein, we would still be as

far from obtaining the relief to which we are entitled, or any substantial relief, as we were at the beginning of the action of ejectment.

We are not seeking by our bill in this case to have our title quieted to one or more empty chambers beneath the earth's surface from which the ore has been extracted. What we do seek is to have our title quieted to the ore bodies, underlying our claims, which still remain in the ground. The title to all such ore bodies, valuable and extensive as they may be, would, notwithstanding the judgment in ejectment, still be clouded by petitioners unlawful assertion of claim thereto. We would after the judgment in ejectment, therefore, be driven to file a bill to quiet title to these remaining ore bodies. Is there any reason why a bill to quiet title thereto may not now be maintained as well as then?

As said by the Circuit Court of Appeals in this case (134 Fed. 772):

> "The principal purpose of the present suit is to obtain a determination of the adverse claim to the remaining ore bodies, not merely to recover the possession of the underground workings and chambers from which the defendants have removed the ore, or to recover the value of the ores removed. Being itself in possession of the remaining ore bodies, and the defendants being out of possession, the complainant has no adequate and complete remedy at law."

Again: the fact that one may have a remedy at law to redress a wrong will not preclue him from resorting to equity, unless the remedy at law be plain, speedy and adequate, "or, in other words, as practical and efficient

to the ends of justice and its prompt administration as the remedy in equity."

The case of Boyce vs. Grundy, 28 U. S., page 209, was one where a bill in chancery was filed by the appellee, Felix Grundy, in the Circuit Court of West Tennessee against the appellants, who were executors of James Boyce, to enjoin a judgment at law which they had obtained against him for $4,700, and to rescind a contract made between James Boyce and Grundy by which Boyce sold and agreed to convey to Grundy a parcel of land, for which Grundy agreed to pay him $20,000, $2,000 of which were to be paid in hand, and the balance in yearly installments of $2,000. A deed of general warranty was by the written agreement of the parties to be made to the purchaser in four years. Grundy having failed to pay the amounts of the installments due January, 1820 and 1821, Boyce's executors commenced suit upon the contract for the first two installments, in the Circuit Court, and recovered judgment for the same, with interest. Afterward Grundy filed his bill, praying an injunction against the judgment at law and a recission of the contract, on the ground of fraudulent and false representations of Boyce in making the sale of the land. Mr. Justice Johnson, speaking for the court, says, at page 213:

> "This court has been often called upon to consider the 16th Section of the Judiciary Act of 1789, and as often, either expressly, or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity, on the subject of legal remedy. It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as prac-

> tical and efficient to the ends of justice and its prompt administration, as the remedy in equity. In the case before us, although the defense of fraud might have been resorted to, and ought to have been sustained, in that particular suit, and I will add, would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate remdey, because it was a partial one. *The complainant would still have been left to renew the contest upon a series of suits;* and that probably after the death of witnesses."

See also:

Watson v. Sutherland, 72 U. S. 74;

Allen v. Hanks, 136 U. S., pp. 300, 310, 311.

In the case of Cable vs. United States Life Insurance Company, 191 U. S., page 288, it was held that the plaintiff therein had an adequate remedy at law, and therefore could not resort to equity, but the court there said:

> "It is true that the remedy or defense which will oust an equity court of jurisdiction, must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction."

See also:

Smith v. Amer. Natl. Bank, 89 Fed. Rep. 832, 837-9.

There is another feature of the case which puts beyond controversy the question of jurisdiction, and that is: It appears that the respondent is the owner of the Fairview Mining Claim; and that there are ore bodies vertically beneath the same, which presumptively belong to respondent.

As shown by the bill and answer thereto, the petition-

ers assert ownership and right of possession to such ore bodies, which assertion, respondent alleges, is unlawful and without right. As to this claim and the ore bodies therein, petitioners have made no entry whatever.

It must be confessed, we take it, that as to the Fairview and its ore bodies, we have, under the circumstances, no remedy at law whatever, for the wrongs complained of. Yet, the unlawful assertion by petitioners of ownership of these Fairview ore bodies, does seriously depreciate the value thereof, rendering it impossible for respondent to sell the same for a fair value, if it desired to do so, and deterring it from expending money in the development thereof while this cloud hangs over the title. In no way can this wrong be relieved other than by a bill in equity to quiet title.

In the petition for a writ of certiorari herein, petitioners claimed that there is a conflict between the decision of the Supreme Court of Utah and that of the Circuit Court of Appeals in this case, in respect of the construction and application of Section 3511 of the Revised Statutes of Utah, 1898, and in support of this claim they cited the case of Park vs. Wilkinson, 21 Utah 279. (There was no such contention as this made either in the Circuit Court or the Circuit Court of Appeals.)

An examination of the case of Park vs. Wilkinson discloses no such conflict. The case, as reported in the 21 Utah, contains no statement of facts, and it is not clear from the opinion of the court which of the parties, plaintiff or defendants therein, was in the actual possession of the premises in controversy.

We have had printed a full copy of the record on appeal in that case, duly certified by the Clerk of the Supreme Court of the State of Utah, which we annex as an appendix hereto; by which record it appears that prior to 1890, one Lorenzo Price was the owner and in possession of the property, and while such owner and in possession, conveyed the same to one Spencer; that afterwards and in November, 1890, Spencer conveyed the property to Robert Morris Wilkinson, one of the defendants, and took from the said Wilkinson a mortgage upon the property to secure a portion of the purchase money; that this mortgage was by Spencer assigned to Park, the plaintiff; that thereafter default was made in the payment of the mortgage, and the same was foreclosed, and sale made under the decree of foreclosure, at which sale plaintiff, Park, became the purchaser, and in due time received the sheriff's deed for the property; the defendants, Robert Morris Wilkinson and his wife, Mima Wilkinson, went into possession of the property under the deed from Spencer in 1890, and remained in possession continuously thereafter until after the trial of the cause of Park vs. Wilkinson, relied upon by petitioners herein.

It further appears from the record that after the deed from the sheriff to Park, under the foreclosure proceedings, the defendant, Mima Wilkinson, in 1895, obtained a quit claim deed to the premises from the said Price, he (Price) at that time not having or claiming to have, any interest in the property whatever, nor was he in the possession of the same, or any part thereof.

In 1897 plaintiff, Park, commenced an action in which

he sought to have his title quieted against an asserted claim or interest therein on the part of the defendants. That he, the plaintiff, was not in possession, but that the defendants were in possession is manifest from the pleadings and evidence in the cause.

The plaintiff in his complaint alleged: "That the plaintiff is the owner of in fee *and entitled to the possession* of the following described property, to-wit:" (Describing it.) It will be observed that the plaintiff did not allege that he was in the possession of the property. (See page 1 of the appendix.)

The defendants filed their answer, denying all the material allegations of the complaint, and the defendant, Mima Wilkinson, also filed a cross-complaint in which she alleged, among other things:

"First: That on and prior to the 11th day of April, 1895, one Lorenzo Price was the owner and in possession of the following described real estate, to-wit:" (Describing it.) * * *

"Second: That on said 11th day of April, 1895, and while the owner and in possession thereof, as aforesaid, the said Lorenzo Price, together with Annie Price, his wife, granted, bargained, sold and conveyed said real estate, by good and sufficient deed of conveyance, to this cross-complainant, Mima Wilkinson, who has ever since that time been the owner and in the possession of the said real estate."

"Third: That the plaintiff unjustly claims the ownership of, or an interest in, said property, the nature of which this defendant and cross-complainant does not

know, but which claim is a cloud upon this cross-complanant's title thereof."

And prayed that her title be quieted as against the asserted claim of Park. (pp. 3 and 4 of the appendix.)

It will be seen that the answer to the cross-complaint fails to deny that the cross-complainant was in possession, as alleged in her cross-complaint. (Page 4 of appendix.)

At page 6 of the appendix, Mr. Spencer (a witness for plaintiff) testified that he sold the property to Mr. Wilkinson and let him in possession of the same, all of it, and at page 7, the same witness says:

"Wilkinson took possession under my sale to him." And at page 8, the plaintiff testifies, among other things: "I am acquainted with the property in dispute. Mr. Wilkinson had the privilege of buying the property back after I bid it in. * * * I got the property about the time of the marshal's deed. Neither he or Mrs. Wilkinson ever claimed to me that they owned the property. * * * *I asked him to deliver me the property in 1895. He said he would vacate as soon as possible.*"

And at page 11, the defendant, Mima Wilkinson, testifies:

"I have been in possession of this land for some time. I have seen the deed from Price for the premises described here. It was April 11th, 1895. I have been in possession of the property ever since the deed was given to me by Price, and have been living there ever since."

And at page 11 she testifies:

"I have been in possession of the land over seven years. I moved there with my husband April 12th, 1890. That was the time he bought from Spencer. I went in the same time he did. Took possession of the whole land and the street east of the creek, I presume, farmed it, that is, my husband, and I as his wife took care of it in a general way as a homestead."

And at page 13 she says:

"I was in possession from 1890 up to the time I received the deed from Price, as merely being there with my family. I was claiming title myself with my husband."

And in rebuttal Mr. Waddell, a witness for the plaintiff, testified at pages 18 and 19, Appendix:

"I am acquainted with Mrs. Wilkinson and had a conversation in her presence with her husband in the latter part of 1895. *We demanded possession of the property, peaceably, or threatened, if it was possible, we would bring an action.* * * * His answer was that he didn't refuse to give us possession, *and he wouldn't give us possession until he thought the thing over and seen something about it.*"

The trial court heard the case before a jury until the facts were disclosed and then discharged the jury and found the issues for the plaintiff.

The defendant having failed upon her cross-complaint, there was nothing then left to be determined except the issues joined by the complaint and the answer thereto, and the evidence presented a case, simply, of a plaintiff out of possession, seeking to quiet his title and to

recover possession as against defendants who were in possession. Of course, upon these issues, the defendants were entitled to a trial by jury, and the Supreme Court of the state so held.

There is no intimation in the opinion of the court that a bill to quiet title could not be maintained under the statute by one in possession against one out of possession who is asserting an adverse claim or interest in the property. That such a suit may be maintained under the Utah statute, was, after full consideration, expressly decided by the Supreme Court of Utah, in the case of the Bullion Beck and Champion Mining Co. vs. Eureka Hill Mining Co., et. al., in the 5 Utah, p. 3.

The statute of Utah, then in force, provided: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. (Laws of Utah 1884, p. 271, Sec. 620.)

It will be observed that this statutory provision is identical with that found in Section 3511, Revised Statutes of Utah 1898.

We are unable to understand how it can be claimed that the case of Park vs. Wilkinson is in conflict with the decision of the Circuit Court of Appeals in this case, in which it was determined that the respondent was in possession of the premises involved, and that the petitioners were not in possession, but were mere trespassers.

Petitioners cite and rely upon the case of Donahue vs. Meister, 88 Cal. 121, and Newman vs. Duana, 89 Cal. 597.

In the last case it appeared that at the time the suit was commenced, the defendant was, and had been for a number of years, in possession of the property, claiming adversely to the plaintiff.

In the case of Donahue vs. Meister the complaint alleged that the plaintiff was in possession. The answer alleged that the property belonged to the defendant; that defendant was entitled to the possession thereof, and was lawfully possessed for several years next preceding April 6th, 1889; that on that date the plaintiff unlawfully and wrongfully entered thereon and ousted defendant therefrom, and that the plaintiff wrongfully withholds the same from defendant, and defendant prayed that he be restored to the possession of the property in controversy.

In the case of Angus vs. Craven, 132 Cal. 691, it is said at page 696: "Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been and in substance is an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere devise of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated, where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been, for a long time, in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not, by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as

substantially an action to recover possession. *But this is as far as this court has gone* in Donahue vs. Meister, 88 Cal.; Newman vs. Duane, 89 Cal."

At page 176 of petitioners' brief we find the following:

> "It was suggested in argument that a writ prohibitory in terms, and mandatory in effect, like that adopted by Lord Elden, in 10 Vesey, 192, would afford the relief desired, without violating any rule of equity, might be easily framed. As to a method of proceeding by which the court pretends to say one thing, intending another, we doubt the propriety of its adoption. The law, which will not countenance any shift or subterfuge in others, should not resort to any when dealing with suitors."

We fully endorse everything found in the above quotation, except the statement that counsel for respondent cited the case from Vesey. We cannot but think that our learned friends are mistaken in this respect. We have no recollection of having ever, at any time, cited the case, or alluded to any rule of practice or procedure recognized therein. And the case itself is so entirely foreign to anything with which we here have to deal, that we are persuaded our memory is not in fault in this matter.

At page 184 of the brief for petitioners, counsel say:

"All other questions apart, the court below ought to have dismissed this suit *sua sponte*, according to the rule established by this court in numerous decisions." And they cite Hipp vs. Babin, 19 How. 271; Parker vs. Winnipieseogee, 2nd Black 545; Lewis vs. Cox, 23 Wall.; Killian vs. Ebbinghaus, 110 U. S. 568; Grand Chute vs. Wine-

gar, 15 Wall. 375; Allen vs. Pullman Car Co., 139 U. S. 658.

In the first of these cases it appeared that the plaintiff out of possession, with legal title, filed his bill against the defendant, who is in possession.

In the next case, Parker vs. Winnipieseogee, the court held that where the bill did not allege an irreparable injury, or facts showing necessity for an injunction to avoid a multiplicity of suits, or other ground for equitable interference, but, on the contrary, it appeared that the remedy by action at law for damages was plain, adequate and complete, the bill should be dismissed.

The next case, Lewis vs. Cox, merely decided that a bill in equity is not the proper means to recover possession of land. The case, as stated in the syllabus, is as follows:

> "A bill in equity is not the proper means to recover the possession of land, there being no fraud in the case, nor other matter especially the subject of equity cognizance, and the party cannot, by any color or suggestion of fraud, etc., use such a bill in place of the common law remedy of ejectment. The court would look at the proofs, and if there be no proof at all of the matter which would make a proper case for equity, it will disregard them, and look at the bill simply in its aspect of one to recover land, of which the complainant is out of possession."

In Killian vs. Ebbinghaus, it was held that a bill in equity could not be maintained where an action in ejectment would afford a plain and adequate remedy.

In Erhart vs. Boaro, the holding was that an injunction will issue in aid of an action for possession of mining

property, where it is necessary to preserve the property pending the suit.

In Grand Chute vs. Winegar a bill was filed to enjoin the defendant Winegar from the further prosecution of an action at law which he had brought against complainant, the Town of Grand Chute. The decision sustaining the demurrer to the bill was affirmed upon the ground that the allegations of the bill showed that complainant had a complete defense which was available to it in the law action.

In the case of Allen vs. Pullman Palace Car Company, it appears that the bills were filed in the Circuit Court of the United States for the Middle District of Tennessee against the Comptroller of the State, for an injunction restraining the collection from complainant of certain taxes, under the laws of the State of Tennessee, which complainant averred to be in conflict with the Federal and State Constitutions, and that the taxes were illegal and void.

In the opinion it is said: "We have already decided in Shelton vs. Pratt, that purely injunction bills cannot be sustained to restrain the collection of taxes upon the sole ground of their unconstitutionality. The jurisdictional averments are more comprehensive in these causes than of that, but we are of opinion that they did not make out a case for equity interposition, for the reasons there given, and in view of the act of Tennessee of 1873, entitled, 'An Act to facilitate the collection of revenues' * * so far as appeared complainant could avert all the consequences which it deprecated as likely to ensue, if the state officials

were not restrained by complying with the terms of the statute and availing itself of the remedy thereby afforded."

In each of the cases cited by respondent, the bill showed upon its face that the complainant had a full, speedy and adequate remedy at law, and that he was not entitled to any equitable relief. We have never questioned the power or the duty of the Chancellor under such circumstances to dismiss, even though no objection be made by counsel.

III.

ANSWER TO ATTACK MADE IN BRIEF FOR PETITIONERS ON RESPONDENT'S MAPS, EXHIBIT "Q" AND OTHERS, SHOWING RELATIVE SITUATION OF THE VARIOUS CLAIMS.

In effect the charge is made that these maps of respondent are fictitious. At page 100 of the brief, it is said:

> "It will be observed also that upon the maps introduced in evidence by the respondent, the corner posts of the Mountain Gem are numbered differently from the numbering in the patent itself. The fact is that upon the maps of the respondents, Exhibit 'KK,' 'T,' 'S' and other maps, showing the position of the Mountain Gem Claim, the boundaries of the claim have been moved to the south 52 feet from their real position, thus putting more of the limestone outcropping within the Mountain Gem, and diminishing the amount within the Kempton and reducing the extent of the conflict between the Mountain Gem and Kempton which was patented to the Kempton. *For the purpose, evidently, of making plausible this change, there is indicated*

> near the center of the moved claim, a discovery, by a point upon the map, at which point there is no work or development or discovery of any kind, and this point is fifty-two feet south of the claimed inclined discovery shaft, originally of the Gem, shown upon the Gem plat, and which is cut in two, as we have pointed out, by the south side line of the Kempton Claim."

And at page 102 it is said: "There is a radical difference, however, in the position of the easterly side line of the Northern Light Claim and the southerly side line of the Grizzly Claim, as presented by petitioners' Exhibit 20, and the same lines as traced upon respondent's map, Exhibit T. Exhibit T indicated the apex by a dotted line, and as departing from the line of stripping on apex of Ashland fissure at a point which corresponds with station 907 on petitioners' Exhibit 20, and which is the same as respondent's station 37, Exhibit T. The result is that this outcrop *conveniently* enters the Grizzly Claim from its southerly side line, passing on through the *improvised* westerly side line of the Ashland Claim and continuing on northerly outside, but within a few feet of, that line, throughout and beyond the northerly side line of the Grizzly Claim. There are two errors in this exhibition by Exhibit 'T.' In the first place, the dotted line does not indicate the real position of the Ashland outcrop; and in the second place, the side line of the Northern Light is moved 32 feet easterly from its true position, as shown by the patent plats, and as is the fact, and makes an encroachment upon the Ashland Claim to this extent."

And at page 107 it is said: "The fact is that the Northern Light and Grizzly and Fairview Claims upon

this map (meaning map of respondent) have been pushed east and south of their true positions, distances varying from 35 feet to 126 feet, *the truth of which appears from indisputable facts in the record.*"

And at page 113: "Again, the Fairview Claim, *in order, no doubt, to make it sustain its proper relation to the Grizzly, and to have a close relation to the surface overlapping the ore body in dispute,* is made to overlap the Northern Light Claim, as shown by the dotted line, sixty-four feet, for more than one-half of its length, *notwithstanding no conflict in fact exists between those claims, as is proved by their respective patents.*"

It is unmistakably suggested that these alleged errors are due, not to honest mistake, but that they were designedly committed with intent to deceive. The accusation is so made as to call in question the integrity of every one engaged in preparing respondent's case for trial and in the presentation thereof in the courts. The charge of so gross an offense may not be passed by in silence. We feel that we are called upon, as a matter of duty to the court and to ourselves, to present in detail the evidence bearing thereon.

It is shown by the evidence that Mr. J. Fewson Smith (respondent's surveyor) in making his survey of the several claims, gave heed to United States patent posts, wherever he found them, and where, he believed and had reason to believe, they were in the position in which they were originally placed. That he also gave heed to the natural or permanent objects called for in the respective patents,

and which he found on the ground, such as discovery points of the claims, tunnels, cuts and other openings. While Mr. Adolph Jessen (petitioners' surveyor) platted the Fairview, Northern Light and Grizzly Mining Claims solely from *some* of the calls in the field notes of the patent surveys. In like manner he platted all of the Ashland Claim, except the southwesterly portion thereof, where are found posts 1, 2, 3 and 6 of the Ashland. It is at least doubtful from the evidence, whether or not Mr. Jessen attempted to make any survey at all in the field, of either the Fairview or Grizzly Mining Claims.

At page 138, being asked if he made surveys of the Kempton, Ashland, Grizzly and Fairview Claims, he answered that he had as to the Kempton and Ashland; while as to the Fairview he says that he "looked for stakes" on that, and as to the Grizzly he said, "Yes, I have hunted for stakes on the Grizzly Claim."

Mr. Smith testifies, at pages 74-75, that for eight or ten years prior to the trial he had been familiar with the group of claims belonging to the respondent, and that during that time he had made surveys of these claims, and located them upon the ground.

And at page 75, referring to his survey of the Northern Light, he testifies:

Q.—Are you familiar with the claim called the Northern Light, numbered 53?

A.—Yes.

Q.—Have you located that upon the ground?

A.—Yes, sir.

Q.—From what data?

A.—Existing patent corners, natural objects, bearing points and the official records of survey for patent.

And at page 76:

Q.—Now, you say you located the Northern Light?

A.—Yes, sir.

Q.—Did you find any other reference objects by which you located the Northern Light upon the ground?

A.—In locating the Northern Light I found a cut 96 feet long, about 25 feet wide and 5 to 7 feet in depth, at a point which I had reason to believe was in close proximity to the neighborhood of the discovery.

(At page 113 of brief for petitioners the witness is quoted as saying that in locating the Northern Light he found a cut at a point which he had *a reason* to believe was in close proximity to the neighborhood of the discovery, and he is criticized for stating that he had *a reason* without disclosing what the reason was. What the witness in fact said was that he found a cut which he had *reason* to believe was in close proximity, etc.)

And at page 77:

Q.—How did you locate the Northern Light upon the ground?

A.—From corner No. 4, I established corner No. 4 of it, from corner No. 4 of the Ashland Lot 67.

Q.—How did corner No. 4 of the Ashland help you to locate the Northern Light, in what way?

A.—The notes of the official survey of the Ashland refer to a direct connection between those two posts. (Meaning posts at corner No. 4 of the Ashland and that at corner No. 4 of the Northern Light.)

And at page 78:

Q.—What other reference objects did you find by which you were able to locate the Northern Light upon the ground, except the Ashland No. 4 post?

A.—The large open cut 96 feet in length and about 25 feet in width and 5 or 10 feet in depth, the discovery pit or shaft at what is called the discovery cut, and the tunnel running in the direction of the shaft.

Q.—In the places called for in the patent?

A.—Approximately; and these reference points were used in determining the position of the discovery also. The question of its location was influenced by the position of the pit and post claimed to have been found at the intersection of the Kempton line with the Northern Light and reported in the official notes of the survey returned for the Ashland No. 67.

And at pages 78 and 79:

Q.—In the Northern Light field notes, they call for the Ashland tunnel, do they not?

A.—Yes, sir.

Q.—And where is that situated?

A.—One of those two tunnels—this tunnel, I presume (indicating).

Q.—Did you tie to that in making your location?

A.—Well, I did not tie it at the time of locating these boundaries; I did not at that time tie to these points. But I had tied to all the points at some time.

Q.—Does the location of the tunnel agree with the location as you found it on the ground, with reference to the Northern Light?

A.—Well, approximately nearly.

Q.—Approximately?

A.—Approximately only.

And at page 81:

Q.—Now, have you laid down the Northern Light Claim upon this map in accordance with the data which you found upon the ground and have described, and in its proper relation to the other claims that are laid upon the map?

A.—Well, it is not laid down with relation to anything except its individual proof, that is, its actual position upon the ground has been determined without regard to any of the adjacent claims, excepting this tie to corner No. 2 of the Ashland Lot 67.

Q.—But you have laid it down with reference to these various objects that you have described?

A.—Yes, sir.

Q.—As you found them upon the ground?

A.—Yes, sir.

And (referring to the survey of the Ashland) he says at pages 75-6, that he is familiar with the Ashland Claim; that he has located that upon the ground by tying to the existing corners and reference objects; that he had access to the survey notes of the Ashland, and proceeds:

Q.—Now, what corners did you find upon the ground of the Ashland Claim?

A.—I found corners at about the points where the red circles are shown on this map, representing the patent corners and monuments found in place. I found corners 2, 3 and 4 of the Ashland, Lot 67.

Q.—When did you first find these corners?

A.—About eight years ago, at least.

Q.—Could you determine whether or not they were in their original places?

A.—I could. I would change that as to this corner No. 3. I found 2 and 4 seven or eight years ago, and 3 I located some two months ago. It was an old hewed post, six feet long by six inches in diameter, lying down, and marked W. C. (meaning witness corner) to corner No. 2 of the Ashland.

Q.—How could you determine whether it was in its original place?

A.—It had all the appearance of age, and the rock and sand in the mound about it was in place and apparently not disturbed much, being in the brush. I found the rotten stump still there. In that case I think the post had fallen, but found the rotten stump of it in place.

He further testifies, at page 76: Post No. 4 of the Ashland was in a little more exposed position, but giving every evidence of being the original corner; that he thinks the post was standing or leaning up at the time he first saw it, but his handling of it caused it to fall over; that he found a mound of stones about it and made an examination and found the old end there; that he first found post No. 3 about two months ago. The post in that case was standing and bore all the marks of age. It was properly marked and surrounded by a mound of stones.

Q.—Did you locate the Ashland upon the ground?

A.—At this time I located the Ashland and I tied to the Ashland corners of the surveyed boundaries.

* * *

Q.—Now, in locating the Ashland, did you find any other reference object except the posts you have mentioned?

A.—Yes, sir.

Q.—What was the object that you found?

A.—I found topographical features and a cut and tunnel shown.

Q.—You say they were reference objects?

A.—They were objects called for in the official notes. The notes of the official survey for patent.

And at page 77, the witness having testified that he found the Grizzly discovery; that it was pointed out to him seven or eight years ago, at the time of making the survey of the Ashland when he found corners 2 and 4 thereof, and that it had been recently pointed out to him by the witness Barney McManamon, was interrogated as follows:

Q.—And in locating the Ashland, did you locate it with reference to the discovery point of the Grizzly?

A.—I made a connection between the two; yes.

Q.—How did it agree as you found it upon the ground, with the calls in the patent survey notes?

A.—It agrees almost exactly.

And on cross-examination, pages 86, 87 and 89, the witness testified that in making his location and survey of the Ashland Claim, as shown upon Exhibit "Q," he started at post No. 2 of the Ashland, Lot 67, which was

properly marked; that he made a recent survey of the Ashland in company with Mr. Jessen; that they started from post No. 2, ran to post No. 3, following the patent call from post No. 3, to find this corner (meaning corner No. 4 of the Ashland); that in running that line they did not find Ashland post No. 4. And then proceeds as follows:

Q.—The fact is that you reached a point about 14 feet west of that point, did you not?

A.—Well, no; in that line we ran up to a point some distance back of the post itself. We did not terminate at the post.

Q.—Did you terminate at the point west of the post?

A.—Well, I don't know whether we terminated west of that post or not. We terminated west of the point that we found at that time.

Q.—When you got to that point where your survey terminated there, did you find this post that you spoke about lying upon the ground about 14 feet east of the point that you came to?

A.—We found a post there, to which we made a tie. The post was lying upon the ground.

Q.—And was it in about 14 feet east of the point that you have established at this corner?

A.—I don't know really the point we stopped at there; between forty to fifty feet south of that corner, and it was a little—let us see—it would be almost due south of this.

Q.—Well, it would be west, too, would it not?

A.—No, sir; I don't think it was at all west, the line we run——

Q.—Now, you ran this distance on this course. Now, tell me where you landed when you quit?

A.—We ran the recorded course and distance from that corner and stopped at a point opposite to this post 4 and made a tie to that. We found it between 10 and 20 feet—I forget the exact distance—to the east of us. I think it was east at this corner of the Northern Light, lot No. 53.

Q.—You found this post lying upon the ground east?

A.—No, sir.

Q.—Well?

A.—We did not find it that day at all; that is corner No. 4 of the Ashland, and corner 4 of the Ashland when I found it, was lying down, but when I went up to the office and checked the line, I found a discrepancy, that it was not the post I thought that we had run to, (and then I went back again to find the post and found it lying down).

Q.—Answer my question. Maybe I am dull of comprehension, but is it not the fact, that when you first ran this line on the calls of the patent, you came out here at a point either northwest or west, or to the southwest of the point that you have established there?

A.—No, sir.

Q.—While, the monument you found of 4, Lot 67, as established by you, as it has been established—

A.—I see what your drift is. No; we terminated about 50 feet almost due south from that post marked 4 of the Ashland 67.

Q.—And no distance west?

A.—We did not. Well, I cannot tell without figuring it, but we did not run the recorded distance from here to that corner in order to terminate at that point.

Q.—Do you say you were not 14 feet west when you terminated your line, west of where that point is located?

A.—Yes, decidedly; I was west of that point 4 of Northern Light Lot 53.

Q.—You say decidedly you were?

A.—West of that corner No. 4 of Lot 53.

Q.—As it is now located?

A.—As it is now located.

Q.—How many feet?

A.—Somewhere between 10 and 20 feet. I did not measure it and was not interested in that.

Q.—Did you find an old stake up there without any marking on it?

A.—No, sir; I found the stake properly marked, if that is the one you pointed to.

And on re-direct, page 91:

Q.—Now, you spoke of finding this post 4 of the Ashland upon the ground, and that I understand you was when you were there with Mr. Jessen?

A.—Yes, sir.

Q.—Did I understand you to say that is when you were there seven or eight years ago, you found it standing in place?

A.—That is my recollection.

Q.—And afterwards had fallen down?

A.—Yes, sir.

Q.—Did you find the mound of stones in which the post originally stood when you were there with Mr. Jessen?

A.—Yes; the mound is still there.

Q.—The post was in that mound of stones?

A.—Yes.

Q.—You found that in place?

A.—The post was in that mound of stones when I went to it the first time. The post is now lying down, but the mound still remains.

Q.—And in the same place where you found it seven or eight years ago, with the post in it?

A.—Yes, sir.

Q.—And when you say you ran this line from post No. 3 of the Ashland to post No. 4, did you mean to tell counsel that you came out 14 feet west of post No. 4 of the Ashland or west of post No. 4 of the Northern Light?

A.—I think I made it clear that it was west of the post of the Northern Light.

Q.—The distance which was called for did not bring you as far north as post No. 4?

A.—We did not run the patent call there; we run the line to connect with this post, and by mistake stopped at this one in the hurry to get dinner and quit there and afterwards I found out our error. I do not remember what distance we run, but we did not run the called course.

Q.—Is the distance between posts 3 and 4 as you have stated it here?

A.—It is.

Q.—What is it?

A.—1173.7 feet.

Q.—Is that the distance called for in the patent notes?

A.—No, sir.

Q.—What is the distance?

A.—Somewhere in the neighborhood of 40 feet in excess of that.

Q.—So that you shortened that distance because you found that post in place upon the ground?

A.—Yes, sir.

And, referring to the Fairview, the witness testifies, at page 83, that he located the Fairview; it was tied to corner No. 1 of the Grizzly Lot 52; that he found corner No. 1 of the Grizzly in place; found the corner of the adjacent patent from which a tie had been given to corner No. 3 of the Fairview Lot 54, and that combining that information, he determined the position of the Fairview.

And on cross-examination, page 89:

Q.—Is it not a fact, Mr. Smith, that the Fairview Claim, as it is patented, does not overlap the Northern Light at all?

A.—As it is patented, the description shows that it does not lap on the Northern Light.

Q.—How much difference?

A.—In the neighborhood of 70 or 80 feet.

Q.—70 or 80 feet you have overlapped the Fairview on the Northern Light, when the patent does not make any overlapping at all; is not that the fact?

A.—The patent is issued on the assumption that the courses and distances reported between the discoveries of these two claims are correct. By examination on the ground I found that this is not correct, and consequently,

finding the real monuments, I have laid out the ground as it really has been patented.

And referring to the Grizzly, the witness testifies, page 80:

Q.—But you found corner No. 1 of the Grizzly still standing?

A.—Still in place.

Q.—Can you determine whether or not it is in its original place?

A.—There is no question about that.

Q.—How did you determine it is the Grizzly?

A.—Well, by its age and appearance and the locality and markings, properly marked ties with respect to the Neptune posts and its tie to the Grizzly discovery.

And at page 82:

Q.—Now, from what data did you locate the Grizzly on the ground?

A.—From the official records, using the official records from Post No. 1, that I found in place.

Q.—Where did you get the survey notes?

A.—In the office of the United States Surveyor General.

Q.—Now, with the exception of post No. 1 that you found, did you find any reference objects upon the ground from which you were able to locate the Grizzly?

A.—Yes, sir.

Q.—What else?

A.—The post at the discovery point.

Q.—You found that in its proper position on the ground?

A.—Well, I think it was its proper position.

Q.—You say that Mr. McManamon pointed out to you the discovery point; how does that agree?

A.—That agrees very closely to the position; within eight or ten feet.

And at page 82:

Q.—State whether or not the Ashland and the Northern Light, as laid down upon the map, bear their proper relation to one another, as shown by these various objects that you found upon the ground and these monuments?

A.—They show their proper relation, decidedly.

* * *

Q.—Is the Grizzly laid down upon this map correctly and in accordance with these reference objects as you found them, upon the ground?

A.—Yes, sir.

And at page 79 he testified that the tie between the discovery of the Northern Light and United States Mineral Monument No. 1, as called for in the official return of the patent survey, is in error as to course by about 3 deg., and as to distance by 52 feet, being too long by 52 feet, and that if we were to take that call or tie alone, the Northern Light would be carried 52 feet further westerly than he has it platted; that there is a discrepancy of 13 min. in course and 25 feet in distance between the Mineral Monument and the Ashland, as called for in the official notes, and the actual course and distance, so that if we were to take that tie alone, it would carry the Ashland further to the west by about 25 feet.

(And at page 80): That between the official tie of the Grizzly discovery and the Mineral Monument, there is a discrepancy of 25 min. in course and 126½ feet in distance, the recorded or official distance being that much longer than the actual distance.

And at page 79, referring to the Kempton Claim:

Q.—With reference to its tie to the United States Mineral Monument, did you find any discrepancy?

A.—Yes; there is a difference of 25 min. in the course, and 46.8 feet in the distance, the recorded or official distance being 975 feet.

Referring to the Mountain Gem, he said at pages 79-80:

That he found two stakes on the Mountain Gem in place.

Q.—Did you tie that to the U. S. Mineral Monument in making your survey?

A.—I had already tied corner No. 2 of that claim (which is the southeasterly corner).

Q.—Any discrepancy in the length of the line?

A.—I have not made any computation of it. I don't think there is. I know there is not more than a foot or two at that point.

(Referring to the Jordan Lot 64, pp. 80-81, he testifies that the error in the official notes, for the tie to the Mineral Monument, is only 14 min. in course and 12½ feet in distance, and he found the discovery of the claim in place.)

These errors in ties to the Mineral Monument called for in the official notes of the several claims, were deter-

mined by the witness from actual survey, as is shown at page 90:

Q.—Now, Mr. Smith, you did not undertake to place the Mineral Monument upon the map in any other place than where you found it on the ground?

A.—I did not.

Q.—And you assumed the monument to be in place?

A.—Yes.

Q.—But what you assumed is that the course and distance from that Mineral Monument to another point that you find upon the ground is wrong because you measured the distance between the two points and you find it to be the fact that it is wrong upon the ground?

A.—Exactly so.

And at pp. 92-93 he testifies that if the Northern Light, Grizzly, Fairview and Ashland were respectively platted in accordance with its official tie to the Mineral Monument, they would not agree with anything found on the ground.

And on cross-examination, at page 90:

Q.—Now, if you tie all these claims to this Mineral Monument, you would get the plat of all of them in accordance with the calls of the several patents, would you not?

A.—No, sir.

Q.—You would not? Where would you differ?

A.—I would differ in every instance where the recorded distances are varying from the actual distances. In other words, the connections between some of these claims are consistent and those claims that are consis-

tent would check out, but those that are not consistent with them would not check out.

Q.—According to that statement then your survey differs from the Government survey when the Government parted with its title to these parties; is that true?

A.—Well, the way you put it is true; it ain't correct though.

That these errors in the official ties to the Mineral Monument, as testified to by Mr. Smith, do in fact exist, is not contradicted. It is true Mr. Jessen gives it as his opinion that the errors are not such as testified to by Mr. Smith, but it is evident from his testimony that he never made any survey or measurement to determine to what extent the official notes were inaccurate in this particular.

At pages 141 and 142, after having testified that upon his map, Exhibit "19," claims were laid solely with reference to the connection with the Mineral Monument called for in the several patents; that he had ignored all posts upon the ground and had ignored every other call in the patent, whether for a post on the ground or a permanent monument, or what not, testified as follows:

Q.—And you know that is not correct as put upon the ground?

A.—I think it is 20 or 30 feet—I don't think it is any more than that—out.

Q.—Do you know that it is not more?

A.—I will tell you how. Of course, within 20 or 30 feet, I spoke generally; I did not mean exactly 20 or 30 feet.

Q.—Or exactly 50 feet?

A.—Yes; I mean 50.

Q.—Some are out more than others?

A.—Well, they may be a little. Yes, some are out more than others.

Q.—Some are out considerably more than others?

A.—That is what I do not think.

Q.—The variation is just the same in every instance?

A.—I have got reason to believe it is something very similar.

Q.—Do you know?

A.—I do not know, but I think so because it is in reason.

Mr. Jessen, referring to his plat of the Ashland, at page 139, after testifying that he made a survey to determine the position of the claim, together with Mr. Smith, and that they started at post 2 of the Ashland, where a post was standing, says:

We started at that place. Mr. Smith has had a great deal of experience in that immediate vicinity, and he stated to me that that was the most reliable stake that was there. Now it so happens that the records of the Surveyor General's office have a very good tie of the Ashland claim; it says from post No. 1 the mouth of the tunnel bears north 54 west 90 feet. Of course the mouth of the tunnel is absolutely a permanent object. I tested that before, and I know that the mouth of that tunnel substantially agreed with the position of post No. 2 as it stood and as Mr. Smith claimed was the proper place for it. The post was marked "U. S. L. 67 P. 2 W. C." Previous

to this survey I had dug up the post. Of course it was a very remarkable thing that the post should be standing twenty-five years. I found that the stake had rotted off and fallen down and been set up again in the hole where it was. From there Mr. Smith and I in our joint survey went to post 3 of the Ashland and we found it within a foot and a half of the actual place where it ought to be. We then proceeded along the northwesterly side line of the Ashland and ran on the course that the patent indicates, and when we came to a point about 150 feet—I do not know exactly now—about 150 feet southwesterly of the place where corner No. 1 (No. 4?) of the Ashland ought to be, we found a post that was lying about 18 feet to the southeast of our course. * * * The post was lying down and there was no visible mark on it. It was undoubtedly an old post. Mr. Smith stated that he knew that was the Ashland Post No. 4. We went to dinner and did not go back to that. The fact that Mr. Smith stated that was the post, why I thought that he would not agree to anything else; but that being so, Mr. Smith stated afterwards that he was mistaken in it, that that was the Northern Light Post No. 4; the post that was not marked, and he afterwards found the Ashland No. 4 post further to the northeast. * * * Now then, we ran down and we established from No. 2 to No. 1 and afterwards No. 6 post. * * * I am convinced, from the position of the workings of the Ashland, that it has been located substantially right, I will not say exactly—as far as the Northern Light is concerned, I do not. I have been hunting for posts for it and have been unable to find it, and

likewise the Fairview and Grizzly. Mr. Smith and I do not agree upon the position of those claims at all.

At pages 140-1 on direct:

Q.—What efforts have you made to find the Grizzly and Fairview and Northern Light posts?

A.—Well, I run from a point where there is a claim called the Nemesis. It is a new location by Col. Wall. From post 5 of the Nemesis I ran down this distance to a point where I ought to have intersected Post 1 of the Grizzly. I looked around some for it. Considerably for it in some respects—and I did not find it. I also looked for the stakes of the Grizzly over here. I have not found them. I have not looked for that stake there. I looked for the stakes of the Ashland and Northern Light over here and have been unable to find them at this end.

Q.—With these explanations and reservations, that is a correct plat of the ground?

A.—*That is a correct plat of the way that the records in the office show the position of the claim in connection with the mineral monument connection.*

And on cross-examination, pp. 142-3, he testifies:

Q.—Do not the field notes of the Surveyor General's Office that you consulted, of the survey of the Ashland, tie to the Grizzly discovery? * * *

A.—It may; I do not know.

Q.—Haven't you the notes of it?

A.—I haven't my notes of it. It may, quite likely. I do not know. * * *

And at page 145 of cross-examination:

Q.—Now, did you take the call from the field notes

of the Ashland Survey—the call which referred to the Grizzly discovery?

A.—No, sir; I did not.

Q.—To see whether the Grizzly discovery was where it ought to be according to that call?

A.—No, sir; I did not.

Q.—You cannot say whether that is correct?

A.—I cannot say whether it is or not.

Q.—You cannot say whether the Grizzly discovery is placed on Smith's map just where it ought to be according to that call in the patent?

A.—I can say; I do not think the Grizzly Claim is where it ought to be on this map; but as to where the discovery is in relation to the post, that I do not know.

Q.—Can you say that the Grizzly discovery placed upon Mr. Smith's map, is not exactly where it ought to be, if the call in the Ashland patent for the Grizzly is correct?

A.—Well, I don't know; I cannot say that, because I don't know what that call is.

Q.—You consulted those notes and understood that was the call in the field notes of the surveyor in the Surveyor General's Office?

A.—I consulted it but did not notice that.

And on page 144:

Q.—When you were up in the forenoon in company with Mr. Smith you came across a post lying down which Mr. Smith stated to you he thought was No. 4 of the Ashland?

A.—Yes, sir.

* * *

Q.—And after dinner Mr. Smith told you he had found post 4 of the Ashland?

A.—He told me that several days after.

Q.—Did you go out to see where it was?

A.—No, sir.

Q.—You never went back?

A.—No, I never went back. I had been there before looking for posts.

Q.—Did he tell you where you could find it?

A.—Yes, sir; about where he found it.

* * *

Q.—Did he tell you it was right near a mound of stones in which he found it once had stood?

A.—He said that it was about in the correct position from what it should be if the post we found was corner No. 4 of the Northern Light.

Q.—Didn't he tell you it was right by the mound of stones in which it had probably been originally placed?

A.—I think he did.

Q.—You never went back to verify it at all?

A.—No.

Q.—He told you if it were, if that mound of stones did mark the place, * * * that that post was substantially where it ought to be according to that call in the patent, didn't he?

A.—No; he did not tell me that—about the relative position between the two places?

Q.—Yes?

A.—He said that. * * *

Q.—If you take the call of the patent in accord with

the distance from post 3 to 4, will it not correspond very closely with where Mr. Smith placed post 4 of the Ashland on his map?

A.—*The truth of it is, I do not know.*

At page 157, referring to the Northern Light, his attention being directed to the following call in the field notes of the Ashland patent survey: "I now return to discovery post from which a post at the intersection of Northern Light and Kempton Mining Claims bears north 23 deg. west 36 feet distant." Q.—Show me where that would run—the intersection of the Northern Light and Kempton—how far it would differ from your map?

A.—Why, I cannot say how far it would differ. I know it would differ very much.

* * *

Q.—36 feet?

A.—It would be somewhere here.

Q.—Scale it; you know the scale of the map?

A.—Something like that. * * *

Q.—How far would that carry the side line of the Northern Light easterly from where you have it?

A.—16 or 17 feet.

And referring to the Mountain Gem Claim, page 169, he testifies:

Q.—Your map showing the Mountain Gem Claim does not correspond with Mr. Smith's map; that is, the other map?

A.—No; I see it don't.

Q.—Did you put the Mountain Gem on from the posts on the ground?

A.—No, sir.

Q.—You found posts on the ground?

A.—There was one post. There are posts on the ground.

Q.—You found a post at the northeast?

A.—Yes; it is laying down there, and has been rolling around there in that vicinity.

* * *

Q.—And didn't he (Smith) tell you where the posts were placed by him originally?

A.—I don't know whether he told me or not. I did not pay any attention to where the posts were.

Q.—You knew that he made the survey?

A.—Yes, sir.

Q.—You knew he would therefore know where the posts were originally placed, and you did not ask him?

A.—I did not ask him at all; I just took the record for it.

And at page 170, on cross-examination:

Q.—Don't you understand, as a surveyor, when you find posts upon the ground that are identified as original posts in their original position, that they are controlling?

A.—No, sir; I do not understand anything of the kind. I understand the contrary—that they do not cut any figure at all.

At pages 111-112, brief for petitioners, it is said that the calls in the patent of the Northern Light for intersections with the Grizzly Mining Claim, agree with

those intersections, as shown upon the maps of Mr. Jessen.

Of course, if any map maker were to plat these two claims simply according to the calls of the patent, they could not but thus agree.

But, on such plat, the discovery point of the Grizzly Claim, and that of the Northern Light, being shown to be respectively 126 feet and 52 feet farther from the Mineral Monument than they in fact are, the plat would be erroneous and present a false picture of the relative situation of these two claims.

Moreover, it appears from the testimony of Mr. ~~Smith~~ Jessen that he took the Ashland as the foundation for the platting of the Northern Light, Grizzly and Fairview Claims, and it appears from his testimony that apart from the southwesterly portion of the Ashland, where posts 1, 2, 3 and 6 are found, that he platted that according to the official notes.

And at page 156 he testifies:

Q.—I believe you said that (the Ashland) was one of the best surveys made in the district?

A.—No; I did not say anything of the kind.

Q.—What did you say?

A.—I said it was one of the worst bungled up lot of field notes I ever saw.

And at page 143:

Q.—In other words, Mr. Smith's plat of these claims (Northern Light and Ashland) is correct, if the Ashland patent is correct?

A.—No; the Ashland patent is not correct; it can-

not be correct; the courses are entirely inconsistent with yours.

Q.—Not with mine?

A.—With itself. Calculating the intersections there it is entirely wrong and inconsistent with itself.

Q.—If you calculate the intersections?

A.—Yes, sir.

It is claimed by counsel for petitioners that the Grizzly Claim, as platted by Mr. Smith, was 126 feet south and east of its position, as called for by the official tie of the discovery of the claim to the mineral monument. Granted. We have two fixed objects, the discovery and the mineral monument. Now, by measurement in the field it is found that the official call as to the distance between these two objects exceeds the actual distance by 126 feet. Must not the engineer, if he desires to plat the claim truly, correct the error? Surely he would not be justified, notwithstanding this disclosed error in the official call, in platting the claim as though the discovery thereof was 126 feet further from the mineral monument than it in truth was. He would not be warranted, notwithstanding the discovered error in the official call or tie of the Northern Light discovery to the mineral monument, in platting the Northern Light so as to show that its discovery was 52 feet further from the mineral monument than it in fact was. And yet the attack upon respondent's maps, with respect to these two claims, is based upon the correction of these errors by Mr. Smith in his platting of the claims.

Mr. Jessen assumes that since the Northern Light,

Grizzly and Fairview Mining Claims were surveyed by Mr. Davis, and all of them on the same day, that he (Mr. Davis) must have known the relative position of the claims, and that there would be no greater discrepancy in one than another in the purported tie to the mineral monument. (Record pp. 148-144.) This was also urged in the brief of petitioners, where it is said:

"The probabilities are that the surveyor would not make more than one actual or measured connection with the object in surveying the different claims. And that other distances would be determined by calculations from lines of survey carried through these several surveys."

This is plausible and, nothing to the contrary appearing, it might be said to be a rational assumption or conclusion. But it cannot overcome the fact, testified to by Mr. Smith, and not controverted by any witness, that the error in the official call of the Northern Light placed the discovery of that claim 52 feet further from the mineral monument than it is; and that the error in the official call of the Grizzly placed the discovery point of that claim 126½ feet further from the mineral monument than it actually is found to be by measurement in the field.

At page 114 of petitioners' brief it is said, referring to corner No. 1 of the Grizzly Mining Claim: Mr. Jessen examined the ground and found no stake or monument marking this corner. The nature of the examination made by Mr. Jessen is shown at record, pages 146-7, in which it appears that he did not examine the ground at the southeast corner or corner No. 1 of the Grizzly, where Mr. Smith found post No. 1 standing. But his examina-

tion was some distance from this corner, as located by Smith, and at a place where, as he says: "I looked around. The brush was quite thick in that country. I looked around what I could, but I did not see any."

In petitioners' brief, at page 116, it is said that:

"There was a practical recognition of the erroneous positions given to the several claims by the surveys of Smith, in the progress of trial. Mr. Smith had testified that the lower west drift upon the Neptune tunnel level had been extended westerly in ore into and beneath the Fairview Claim, whereupon his attention was directed to the fact that the respondent's maps showed the Fairview as overlapping the Northern Light Claim, and occupying a position a considerable distance to the east of its true location, as shown by the patents of the several claims, and that by reason of such changed position, the said tunnel of the petitioners appeared to have entered the Fairview Claim, whereas in truth it had not penetrated within eighty or more feet of the true southerly side line of their claim. The error was then and there admitted by respondent's counsel, and by permission of court, at respondent's request, it amended its bill of complaint, by striking out the words 'and the Fairview Mining Claim.'"

Neither expressly, nor by implication, was there any admission or suggestion on behalf of respondent, that there was any error in so platting the Fairview and Northern Light Mining Claims, as to show one overlapped the other.

The west drift referred to will be seen upon map, Exhibit "R," to be beneath ground covered by the North-

ern Light and Fairview Mining Claims, as platted upon respondent's map; but the conflict area between the Northern Light and Fairview, as platted, belongs to the Northern Light. It will be seen by reference to the record that both the Northern Light and Fairview patents were applied for and issued to one and the same person, namely, Mr. George Hardy. The patent to the Northern Light will be found in the record, pp. 39-42, and that of the Fairview, record, pp. 45-7.

Both claims, it appears from the patents, were entered and paid for on the same day, to-wit: the 20th of October, 1874. It will be seen, however, that the Northern Light must have been first surveyed for patent, because its lot number is 53, and the lot number of the Fairview is 54. It is clear, too, that the Northern Light was the first to pass to final entry and payment, because, in the patent therefor, it is designated as "Mineral Entry No. 117," while the Fairview, in the patent therefor, is designated as "Mineral Entry No. 118," in the series in the land office. It thus appearing that the conflict area shown upon the maps belongs to the Northern Light, and that the petitioners' work had not in fact penetrated beneath territory owned by the Fairview, respondent requested to amend its complaint to conform to the proof. (Record p. 106.)

Upon the face of these patents it is true there is no apparent conflict between the two claims. Neither is there any conflict between the two as platted upon petitioners' map, where the Fairview is shown to be adjoining and wholly north of the Northern Light.

If we were to take the courses and distances given in the patents and ignore all else, there would be no conflict. But if the monuments or objects on the ground are followed, then the claims are correctly platted upon respondent's maps. See testimony of Mr. Smith, pp. 97-8, where the following occurs in cross-examination:

Q.—Is it not a fact, Mr. Smith, that the Fairview Claim as it is patented, does not overlap the Northern Light at all?

A.—As it is patented, the description shows that it does not lap on the Northern Light.

Q.—How much difference?

A.—In the neighborhood of 70 or 80 feet.

Q.—70 or 80 feet you have overlapped the Fairview on the Northern Light, while the patent does not make any overlapping at all, is not that the fact?

A.—The patent is issued upon the assumption that the courses and distances reported between the discoveries of these two claims is correct. By examination on the ground I found that they were not correct, and by subsequently finding the real monuments I have laid out the ground as it really has been patented.

There could have been no motive on the part of Mr. Smith in erroneously platting the Fairview, so as to overlap the Northern Light, since thereby the respondent was given less territory than it otherwise would have.

At the end of the brief, we annex a sketch map, on which the Grizzly Lot 52, the Northern Light Lot 53, the Fairview Lot 54, the Kempton Lot 55, the Jordan Lot 64, the Ashland Lot 67, the Mountain Gem Lot 475 are

platted in solid lines, exactly as they are shown on respondent's Exhibit "Q." That is to say, the sketch is as to the boundaries and relative position of these claims, an exact reproduction on a reduced scale of Exhibit "Q."

The Mountain Gem incline, the Jackson incline, and the U. S. M. M. No. 1 are severally platted thereon exactly as they are shown on respondent's Exhibit "T," and the boundary of the small cut in which is shown the mouth of the Jackson incline, is also platted thereon exactly as it is shown on said Exhibit "T."

And in addition there is platted thereon, in dotted lines, the Grizzly Lot 52, the Northern Light Lot 53, the Fairview Lot 54, the Ashland Lot 67 and the Mountain Gem Lot 475, exactly as they are shown on *petitioners'* Exhibit "21."

Now, for a reply to the statement in petitioners' brief that the Mountain Gem, as shown upon respondent's exhibits has been moved to the south 52 feet from its real position, we present this sketch map, from which it appears: First: That from the northeast corner of the Mountain Gem, as shown thereon in solid lines, the course and distance to the U. S. mineral monument No. 1 is south 83 deg. 55 min. E. 709 feet, while the call in the Mountain Gem patent from this corner to the U. S. M. M. No. 1 is south 83 deg. 44 min. E. 714 feet. Second: From the northeast corner of the Mountain Gem as platted hereon in solid lines, the westerly edge of the small cut, in which is shown the mouth of the Jackson Incline, bears north 82 deg. E. 70 feet, while the call in the

Mountain Gem patent from this same corner to the *mouth* of the Jackson Incline, is north 82 deg. E. 70 feet. Third: The course of the easterly end line of the Mountain Gem, as shown hereon in solid lines, is south 25 deg. 37 min. E., and intersects the south side line of Jordan Lot 64 at the distance of 100 feet from the northeast corner of the Gem, which is the exact course and distance called for in the Mountain Gem patent. (Mountain Gem patent will be found record pp. 557-560.

Fourth: The course and distance from the U. S. M. M. No. 1 to the southeast corner of the Mountain Gem as platted hereon in solid lines, is N. 80 deg. 21 min. E. 631.4 feet, while the course and distance called for in the Gem patent is N. 80 deg. 40 min. E. 631.59 feet.)

But again, the boundaries of the Mountain Gem, as platted by Mr. Jessen, and shown on this sketch in dotted lines, is not north, but somewhat south, of the boundaries of the claim as shown by respondent's maps.

In petitioners' brief, pp. 118 and 119, it is said that this claim appears upon petitioners' maps in the same relation to adjacent claims as shown on respondent's maps, and it is said: "This is due to the fact that not having been advised in any way the matter was one of seriousness or importance, at the time our Mr. Jessen, as he stated in his testimony, platted that claim from notes obtained from plaintiff's engineer, Smith, supposing them at the time to be correct."

But it appears that Mr. Jessen's platting of this claim *does not agree* with that of Mr. Smith, and, further, it is shown by Mr. Jessen's testimony, heretofore quoted, that

he made no inqury of Mr. Smith with respect to this claim; that he ignored the posts on the ground and located it by the calls of the official notes of the patent survey.

Moreover, it appears from the claim, as platted upon petitioners' Exhibit "21," that Mr. Jessen did not follow the course called for in the patent as to the side lines of the claim.

It is complained that the corner posts of the Gem are numbered differently on respondent's maps from their numbering in the patent. This is true. And so they are on petitioners' maps. An honest mistake on the part of both surveyors, doubtless. It is also said in petitioners' brief, p. 100, that the claimed incline discovery shaft of the Gem is cut in two by the south side line of the Kempton Claim. We are unable to find anything in the record to sustain this statement.

That the Jordan Lot 64 is correctly platted upon respondent's Exhibit "Q" is not questioned in the record. Now, on this sketch map it appears that on the north side line of the Jordan Lot 64, the course and distance between the east side line of the Ashland Lot 67 and the east side line of the Northern Light Lot No. 53, as both are platted thereon in solid lines, is south 77 deg. 30 min. W. 161 feet, and the patent call in the Jordan Lot 64 between these same intersections, is south 77 deg. 30 min. W. *168* feet, while the course and distance on this same line between the east side line of the Ashland Lot 67 and the east side line of the Northern Light, 53, as it

is platted hereon in dotted lines, is south 77 deg. 30 min. W. *201* feet.

Again, on the north side line of the Jordan Lot 64, the course and distance between the east side line of the Northern Light Lot 53, and the west side line of the Ashland Lot 67, as both are platted on the said sketch map in solid lines, is south 77 deg. 30 min. W. *104* feet, and the patent call of the Jordan Lot 64 for this same intersection, is south 77 deg. 30 min. W. *98* feet, while the course and distance between the east side line of the Northern Light Lot 53, as it is platted hereon in dotted lines, and the west side line of the Ashland Lot 67, is south 77 deg. 30 min. W. *64* feet between the same intersections. And from the intersection of the north side line of the Jordan Lot 64 with the south side line of the Northern Light Lot 53, as both are platted on the sketch map in solid lines, the Northern Light corner No. 2 bears North 65 deg. W. 33 feet, and the patent call of the Jordan Lot 64 for the same tie, is north 65 deg. W. *39* feet, while from the same intersection corner No. 2 of the Northern Light, as platted in dotted lines, bears north 65 deg. W. *70* feet.

Again, from the intersection of the west side line of the Ashland Lot 67 with the south end line of the Northern Light Lot 53, as platted on the sketch map in solid lines, corner No. 1 of the Northern Light Lot 53 bears south 65 deg. E. 95 feet, and the call in the Ashland patent for this same tie is south 65 deg. E. *87* feet, while from the intersection of the west side line of the Ashland Lot 67 with the south end line of the Northern

Light Lot 53, as it is platted in dotted lines, corner No. 1 of the Northern Light Lot 53, bears south 65 deg. E. *60* feet.

And from the intersection of the west side line of the Ashland Lot 67 with the north end line of the Northern Light Lot 53, as both are shown on the sketch map in solid lines, corner No. 4 of the Northern Light bears south 65 deg. E. 18.4 feet, and the Ashland patent call for the same tie to the Northern Light corner No. 4 is south 65 deg. E. *20* feet, while the west side line of the Ashland Lot 67, as shown on dotted lines, *does not intersect at all the northerly end line of the Northern Light Lot 53* as it is shown on the sketch map in dotted lines.

Again, the distance from the intersection of the westerly side line of the Ashland Lot 67 with the north end line of the Northern Light Lot 53, as both are shown on the sketch map in solid lines, to corner No. 4 of the Ashland Lot 67, is 35.4 feet. Reference to the Ashland patent shows the distance between said point of intersection and corner No. 4 of the Ashland to be *36* feet, while the distance from corner No. 4 of the Ashland, as shown in dotted lines to the position where the westerly side line of the Ashland would intersect the northerly end line of the Northern Light, as shown in dotted lines, if such end line were extended in its own direction to such intersection, is *68.6* feet.

Finally, from corner No. 4 of the Ashland to corner 4 of the Northern Light, as both are platted on the sketch map in solid lines, the course and distance is south 39 feet, and the course and distance called for in

the Ashland patent between these same corners, is south *39* feet; while the course and distance between corner No. 4 of the Ashland and corner No. 4 of the Northern Light, as both are platted in dotted lines, is *south 37 deg. W. 70 feet.*

We invite attention to the Ashland patent and the plat accompanying the same, in supplement to record, entitled "Stipulation and Exhibits," pp. 3 to 8. And invite a comparison between this patent plat and the Northern Light and Ashland Claims as platted upon the maps of respondent.

A word with reference to map "X," found at the back of brief for petitioners. If this is placed side by side with respondent's map, Exhibit "Q," and attention directed to the northeasterly end of the Ashland and Northern Light Claims, it will be seen at a glance that map "X" does not show these claims in the position that they are found on Exhibit "Q."

IV.

WE ARE NOW BROUGHT TO A CONSIDERATION OF THE DEFENSES ATTEMPTED TO BE MADE BY PETITIONERS TO RESPONDENT'S CASE IN CHIEF.

In an effort to overcome the case made by respondent, petitioners took inconsistent positions. In their amended answer are found the following allegations:

"These defendants aver that every known vein or lode of metal-bearing ore, earth and rock in place, existing in the said alleged Jordan Extension Mining Claim,

the Northern Light Mining Claim, the Grizzly Mining Claim and the Fairview Mining Claim, including the lode and vein mentioned in complainant's bill of complaint * * * has its top or apex within the surface lines of the said *Kempton* patented ground, and is a part of the same on their dip beyond the northerly vertical side line of said Kempton Claim, and the same and every part thereof in its dip lies between vertical planes drawn downward through the end lines of said Kempton Claim protracted and so continued in their own direction that such claims intersect the exterior parts of such veins or ledges in their dip past the northerly vertical side line of said Kempton Claim, underneath the surface of said Jordan Extension Claim, the Northern Light Claim, the Grizzly Claim and the Fairview Claim, and constitute a part of the Kempton Lode Mining Claim, and the veins and lodes patented to the grantors and predecessors in interest of defendants, by the said patent of the 23rd of February, A. D. 1875." (Par. 12 of amended answer, record p. 35.)

If this allegation be true, it is not possible that the Ivanhoe Mining Company, or Wall, as its lessee, can have any defense to the cause of action set forth in the bill of complaint.

But in the "further and separate defense" contained in this amended answer, the original defendants, namely, Lawson, Harvey, Balbach, and Wall, join with the Ivanhoe Mining Company in asserting that at least some part of the ore bodies found beneath the Northern Light, Grizzly and Fairview Mining Claims are in a vein having its apex in the said Ashland Mining Claim, owned by peti-

tioner, the Ivanhoe Mining Company. (Second and third paragraphs of this "further and separate defense," (record, pp. 32-3.)

If the allegations found in these second and third paragraphs be true, then it is plain that petitioners Lawson, Harvey, Balbach, and Wall, as their lessee, have no possible defense to the case stated in the bill of complaint, so far as such portion of the ore bodies involved and lying beneath the Northern Light, Grizzly and Fairview Claims may be found to be in the Ashland vein or lode. The two defenses cannot stand together. One or the other of them must be without merit.

We will discuss and consider them in their order. First: The contention of petitioners as to extra lateral rights attaching to the so-called Kempton lode may, we believe, from a fair reading of all the evidence offered on their behalf, be stated as follows: That the country in the immediate vicinity of the territory in dispute is composed of a series of alternating beds or belts of quartzite and limestone, having a course easterly and westerly, and an inclination or dip northerly. That upon one of these belts of limestone (which we call the Jordan Lime) the Kempton Claim is laid in part, and that in this limestone is found the apex of what petitioners call the Kempton Vein; that such apex had been traced on its course or strike at the surface in a general easterly and westerly direction, for a distance of about 420 feet; that this vein is a bedded vein, that is, conformable in strike and dip to the limestone beds; that it terminates on its strike easterly at a point about 15 feet westerly of the northeast

corner of the Mountain Gem, or about 15 feet northerly of one of the south side lines of the Kempton Claim, and that at the extreme westerly limit of said tracing, at the surface, namely, at station 904 on petitioners' Exhibit 20, ore is found in the face of the tracing; that there is a series of practically north and south fissures, namely: the Ashland, the Sampson and the Kempton Incline fissure, and, according to one of the witnesses for petitioners, Mr. Beveridge, still another is found in the turn sheet level at station 409 on petitioners' Exhibit 21; that these three or four fissures, as the case may be, are substantially parallel in course, and while all dip to the west, they are not quite parallel in dip; that these fissures on their course or strike cut the country, both the quartzite and limestone belts, including the limestone in which the so-called Kempton vein is found; that they are ore-bearing fissures; that where the fissures cut the limestone belt, the metal bearing solutions ascending through the fissures flowed out laterally into the limestone from one fissure to another, depositing their metal contents by metasomatic action, dissolving the limestone atom by atom, and replacing it atom by atom, with the metals and minerals carried in solution, so that in the limestone belt at and near the surface, we have to-day continuous ore from the most westerly to the most easterly of the north and south fissures. That the most westerly of the fissures is the Ashland, and the most easterly, so far as the territory in controversy is involved, is the Kempton incline fissure, and that but for these north and south fissures, the so-called bedded vein would never have had any existence.

Now, conceding for the sake of argument, that the ore body found at the surface in the Kempton Claim and which courses easterly and westerly, is a separate and distinct vein, still we contend that petitioners failed to establish a case entitling them to any extra lateral rights on such vein. It was established by the evidence that this so-called bedded vein does not terminate on its course or strike and at its apex in the Kempton Claim; that it does not cross either end line of the claim, but that it does cross two of the side lines thereof, which diverge in the direction of the dip of the so-called vein.

Referring to petitioners' map, Exhibit 20, we find some surface trenching or work coursing in an easterly and westerly direction in the Kempton Mining Claim, and near to the broken southerly side line. This tracing or trenching, it will be seen, terminates at either end within the Kempton ground. Petitioners claim that this trenching is along and discloses the apex of this so-called bed vein, and that said vein terminated in its easterly and westerly course within Kempton ground, but that it did so terminate they failed to prove.

Mr. Morehouse testified that he examined the surface of the Kempton, following the strippings and excavations shown on petitioners' map, (Exhibit 20), that the excavations and strippings are in ore, showing a vein beginning at a point inside the Kempton surface lines about 15 feet from Post 1 of the Mountain Gem, (to-wit: the Gem, northeast corner); that beyond this point the lime is shown, and there is no ore; that at the point marked "shaft" ore is standing, the strike being northerly and

southerly and it has been stripped from the shaft down for 20 feet probably, showing ore in fissure shape, running northerly and southerly. (Record pp. 181-2.) And at pages 189 and 190 he testifies that he had followed the limestone belt easterly of what he claimed to be the easterly limit of the surface of the Kempton vein 300 or 400 feet, and not at all westerly of what he calls the westerly limit of the apex of the Kempton vein, and did not examine the limestone at the surface easterly of what he claims to be the easterly limit of the Kempton, only by observation from a distance, probably went over it 100 feet or such a matter easterly from where the stripping ended, and observed it casually. (Record p. 190.) That the work running northerly and southerly west of Post 1 of the Gem is partly in ore. Ore and vein matter is stripped as far down as the cuts show. That he would not have any doubt there would be ore running in that direction, and if so, it would carry it across the south side line of the Kempton. (Record 192-3.)

And Mr. Beveridge testified that he had spent a few days examining the Ashland and Kempton ground. (Record page 218.) He examined the various excavations and outcroppings at the surface of the Kempton; that the ore vein outcrops, beginning at the west end at station 904, and running thence to the eastern end at a point marked "shaft" on the map; can be traced all along. (Record pp. 218-219.) That a small tunnel runs from the bottom of the shaft out through the Kempton side lines. Saw no ore in it except a few stringers running through. (Record p. 219.) And at pages 229-230 he says: That

with the exception of a small portion, there is a continuous tracing of ore from the point marked "shaft," about 15 feet north of Post 1 of the Gem, to station 904. At station 904 there is ore at the extreme west end of the tracing. There is nothing to indicate that the western extremity of the apex of the bedded vein has been reached. And at pages 231-233 he states that he does not say that the bedded vein at the apex does not extend beyond the Kempton's side line at the east end. That it may be found further east than the excavation; that they hav passed beyond the ore zone on the line of the excavations; that, however, it may be found further east; that the chances are that it does cross the side line and if there were ore at the surface, 20 feet southerly from Post No. 1 of the Gem, he would certainly think that the vein had crossed the south side line of the Kempton. If he found ore there he would be certain.

And Mr. W. R. Smith testifies that at the surface of the Kempton, he found ore continuously at a point 15 or 20 feet from Post 1 of the Gem, at which point the ore butts up against a fissure, cutting through the lime—to a point 400 feet westerly.

And Mr. Hannas, at page 261, states that he traced the Kempton vein at the surface from the point near Post 1 of the Gem, westerly to the end of the stripping, in continuous ore. And Mr. McNeill, at pages 279 and 280, testifies that the outcrop of the bed vein begins 15 or 20 feet west of Post 1 of the Gem, where it goes against the limestone—looks like a fissure.

And Mr. Morehouse, on pages 215 and 216, testifies:

Q.—What is there there to terminate the outcrop of what you call the Kempton vein at its westerly end * * * What is there there to enable you to say that it stops there?

A.—Because there is no more ore beyond there?

Q.—Is there any ore at station 904?

A.—Yes, sir. * * *

Q.—You cannot say that the vein stops there; there is nothing to indicate that it does?

A.—I do not say that it does. I do not know that it does.

Q.—Nothing to indicate it?

A.—No, sir.

And Mr. Beveridge, on cross-examination, says that at station 904 (Exhibit 21) there is ore at the extreme west end of the tracing. There is nothing to indicate that the western extremity of the apex of the bedded vein has been reached. (Record 229-30.)

It appears from this evidence that the surface tracing or stripping along the apex of the so-called Kempton vein, terminated at its easterly end, within about 15 feet of the southerly side line of the Kempton, and was pursuing a course, which, if continued 15 or 20 feet further, would have carried the vein over that side line. Petitioners' work of tracing was stopped at a very critical point. Just a few feet east of this the respondent did some stripping in the work marked "tunnel and shaft," and running northerly and southerly from the shaft, all shown on defendant's Exhibit 20.

And Mr. Morehouse, at pages 192 and 193, testifies as follows:

"Q.—How far southerly in that line of work running northerly and southerly and just west of post 1 of Mountain Gem, do you have ore or unmistakable vein matter?

A.—Possibly stripped as far down as that cut shows.

Q.—As far as the cut shows?

A.—Possibly the strippings run across that way, and show up in the workings here and going downward. This was covered with some debris, that little pit run off that way to probably here, went through there; I would not have any doubt there would be some ore running there in that direction.

Q.—That would carry it across the south side line of the Kempton, of course, that particular ore?

A.—If it went there, yes, sir; I would not swear it did or did not."

Others of their witnesses admit that there is ore in this north and south stripping, at post 1 of the Gem, and it is only a few feet east of where petitioners' tracing stopped, but they claim that such ore is in another north and south fissure, and is a separate and distinct vein from the one which terminates easterly, where their tracing ceased. (See p. 261.)

For instance, Mr. Beveridge, at p. 219, in speaking of the easterly limit of defendant's tracing:

Q.—Can you say where it ends?

A.—It ends about this point here, within a few feet of this shaft. I do not see any mark.

Q.—At the point marked shaft?

A.—Shaft, small shaft; and a little tunnel running from the bottom of the shaft through the Kempton side lines, I presume that is correct.

Q.—Is there any ore in that tunnel running out?

A.—I did not see any ore with the exception of a few stringers running through there.

And at p. 233:

Q.—Do you say that the east end of what you call the bedded vein at its apex terminates and stops within the limits of the Kempton?

A.—At that point. That is the Kempton vein here.

Q.—Do you say that it does not extend beyond that side line?

A.—No, sir; I do not. * * *

Q.—Have you any opinion whether it crosses that line or not?

A.—No, I have no opinion; the chances are it does cross that line. * * *

Q.—I should say the Kempton side line. If you found ore at the surface south of the side line of the Kempton and within say thirty feet of post 1 of the Mountain Gem you would be of the opinion that that vein had crossed the south side line of the Kempton, wouldn't you?

A.—I would be certain if I found ore there.

(It will be noted in this connection that a number of witnesses on behalf of respondent testify in rebuttal, and there is no controversy about it, that at the work marked "corner incline" on our surface map, Exhibit "R," there was shipping ore at the surface, within thirty feet southerly of said post 1 of the Gem; that ore was shipped there-

from; that there is ore there now, and that the ore at such corner incline is conformable to the beds. See Holden, pp. 347-8.

It is reasonably certain, therefore, we take it, that treating this so-called bed vein of petitioners as an entity, or vein separate and distinct from any other vein, that it crosses the southerly side line of the Kempton between posts 4 and 5 thereof.)

Now, going to the westerly limits of petitioners' tracing upon this so-called vein, we find it stops at station 904, and is, as we have already seen, in ore at its face. This brings it within a distance of ninety feet of another side line of the Kempton, to-wit: that portion of the side line found between posts 2 and 3 of the Kempton, and it is there pursuing a course, which if continued, would carry it across the last mentioned side line.

Again, we have two bodies of ore, each marked "stope," as we go in from the mouth of the Ashland No. 2 tunnel westerly of stations 702 and 703, as shown on defendants' Exhibit 21. And Mr. Beveridge, at pp. 238-9, testifies respecting the same as follows:

Q.—I say at station 702 you have ore at the contact?

A.—We have the contact there.

Q.—You have ore there; answer the question?

A.—We have ore there.

Q.—There is a place marked stope westerly from station 703; that is in lime, isn't it?

A.—Yes, sir.

Q.—And it is ore, isn't it?

A.—Yes, sir.

Q.—And its course is practically at right angles to your Ashland fissure, isn't it?

A.—Yes, sir.

Q.—That is in the bed vein?

A.—That is in the bed vein.

Q.—There can be no doubt about that in your opinion?

A.—From appearances that is my opinion. * * *

Q.—Now, you had ore there at the surface?

A.—Yes, sir.

Q.—In your tracing at station 904?

A.—Yes, sir.

Q.—And here you have ore again in the bed vein?

A.—Yes, sir.

Q.—If that be true and your opinion be correct, then (that) this has crossed the side line of the Kempton between stations (posts) 2 and 3—isn't it of necessity the same vein?

A.—I think so, yes.

Reference to the map will show that the stope westerly from station 703, which the witness has said is in the bed vein, is practically in line with the westerly limit of the tracing at station 904, where there is also ore, claimed by defendants to be in the bed vein. It is morally certain, therefore, that the so-called bed vein of petitioners has crossed the other side line of the Kempton. Either that, or we must be asked to believe that there are two bed veins, one terminating somewhere westerly of station 904, and another taken up in the stoping at station 703.

The Kempton claim is not a parallelogram, but an eight-sided figure, having broken side lines, and if this so-called bed vein of petitioners has crossed one of its side lines between Posts 4 and 5, and another of its side lines between Posts 2 and 3 of the claim, these located side lines become the legal end lines.

The well settled doctrine is that, the real end lines of a claim are those which cross the vein on its strike or course, no matter how they may be designated by the locator.

2nd Lindley on Mines, Sec. 586-7;
Flagstaff M. Co. vs. Tarbett, 98 U. S. 463;
Argentine M. Co. vs. Terrible M. Co., 122 U. S. 478;
Iron Silver M. Co. vs. Elgin M. Co., 118 U. S. 196;
Last Chance M. Co. vs. Tyler M. Co., 157 U. S. 683;
Del Monte M. & M. Co. vs. Last Chance M. Co., 171 U. S. 55.

In the case last above cited, this court quoted with approval the following language, from the "Elgin" or "Horseshoe" case, *supra*:

"The exterior lines of the Stone Claim form a curved figure, somewhat in the shape of a horseshoe, and its end lines are not, and cannot be made, parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of

his nine-sided figure, and, apparently for no other reason than their parallelism, called them end lines.

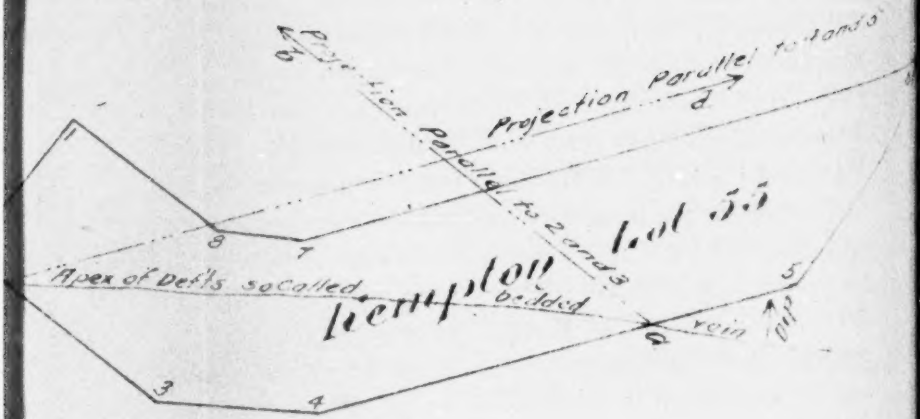
We are therefore of opinion that the objection, that by reason of the surface form of the Stone Claim the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof." And proceeds as follows: "It is true the court also observed that if the two lines named by the locator were to be considered the end lines, no part of the vein in controversy fell 'within vertical planes, drawn down through those lines continued in their own direction.' But notwithstanding this observation, the point of the decision was that the lines, which were the end lines of the location as made on the surface of the ground, were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the Chief Justice, who, with Mr. Justice Bradley, dissented, in which he said: 'I cannot agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other and cross-wise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface.' "

"In other words, the court took the location as made

on the surface by the locator, determined from that what were the end lines and made those surface end lines controlling upon his rights, and rejected the contention that it was proper for the court to ignore the surface location and create for the locator a new location, whose end lines should be cross-wise of the general course of the vein, as finally determined by exploration. That this position and that in the Tarbet case, *supra*, were correct expositions of the statute, and correctly comprehend the intent of Congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, Congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator."

And in the Del Monte case this court also said:

"It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute, this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein, with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length, ought to be awarded to him, if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions where great irregularity of surface exists, and the course or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strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive.

We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps these rules may have all the virtues which are claimed for them, and if so, it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, what is equity, but, What saith the statute?"

In 2nd Lindley on Mines, Sec. 586, the author, referring to the decision in Flagstaff M. Co. vs. Tarbet, says that two important basic principles were there established. "(1) A vein cannot be pursued on its course beyond the lines which it actually crosses. The patentee takes only so much of the vein as his lines actually cover. Where such vein crosses two opposite side lines, these lines, in law, are the true end lines of the location;

(2) The right to follow the dip of the vein is bounded by the end lines properly so called, which lines are those which are cross-wise of the general course of the vein on the surface."

We present herewith a diagram of the Kempton Lot 55, and have laid thereon a line designated "Apex defendants' so-called bedded vein." This line represents the points at which, we claim, petitioners' evidence shows that this alleged bed vein enters and departs from the Kempton. The located end lines run, one of them from

corner 1 to corner 2, and the other from corner 5 to corner 6 thereof, but these *located* end lines cannot, we submit, be regarded as end lines of the claim, for any purpose. The true end lines are those which are crossed by the vein on its course or strike and these lines are seen to be diverging in the direction of the dip of the vein.

The case may not be likened to one where the vein on its strike crosses no line of the claim, as located, yet is coursing in a direction, with that of the located side lines, and towards the located end lines, but terminates before it reaches either of such end lines:—in such a case the located end lines may be drawn into the point where at either end the vein terminates. Here the vein on its strike does, in fact, cross two of the located lines of the claim and the lines thus crossed are the legal end lines of the Kempton. What then are to be taken as the planes between which the Kempton may pursue the vein extralaterally—if at all? The *located* end lines, we submit, cannot be referred to in the determination of this question, for the so-called bed vein of petitioners does not only not cross either of these, but is coursing in a direction which, if continued, would never reach either one of them.

Since the legal end lines of the claim are diverging as aforesaid, we submit that the owners of the Kempton have no extralateral rights, or, if any, at most, such as would be embraced between planes, one drawn through that line of the claim running from Post 2 to Post 3, extended indefinitely in its own direction, and another parallel thereto, drawn through the point where the vein crosses that line of the claim, running from Post 4 to Post

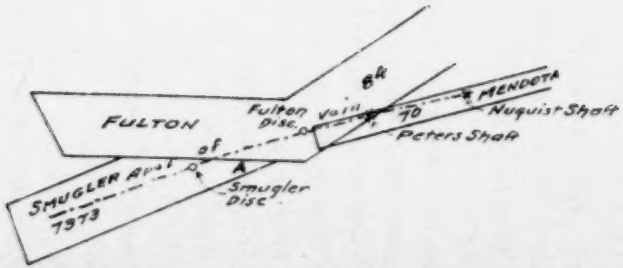
5, or vice versa, between planes, one drawn through that line of the claim from Post 4 to Post 5, extended indefinitely in its own direction, and another parallel thereto, drawn through the point where the vein on its course crosses the line between Post 2 and Post 3, as shown upon the diagram last referred to.

The case of Catron vs. Old, 23 Colo. 433, is precisely in point, as will be seen by the following diagram which is a reproduction of that accompanying the opinion of the court. We quote from the decision:

"Upon the facts which are conceded, a single question of law is raised. The point in controversy may be clearly understood from the map and diagram. * * The plaintiff is the owner of the Smuggler Mining Claim, survey Lot No. 7373. Defendants are the owners of the Fulton and Mendota Mining Claims, survey Lots No. 70 and 834. All the claims are patented and there is no question of surface rights. The dotted line on the map shows the apex of the vein through the claims. This vein, which has been explored extensively in working upon the Mendota and Fulton claims, dips to the south beneath the surface of the Smuggler claim. In following the vein upon its dip, the defendants passed beyond the side line of the Fulton claim, and are working beneath the surface boundaries of the Smuggler claim, at a point marked "A" upon the map. The question presented is as to whether the vein at "A" belongs to the owners of the Fulton or to the plaintiff by reason of his ownership of the Smuggler claim. The plaintiff's right is based upon his ownership of the surface, upon the common law principle that the

owner of the surface owns all above and all beneath. The defendants claim by reason of the apex of the vein being within their surface boundaries. It is claimed that the common law doctrine is changed by Section 2322 of the Revised Statutes of the United States, which provides, *inter alia,* that the owners of the surface shall be entitled to all veins, lodes or ledges throughout their entire depth, where the top or apex of such vein lies within the surface lines of the claim extended vertically downward, although such veins, lodes or ledges may in their downward course, so far depart from a perpendicular as to extend outside the side lines of such surface location; such lateral rights to be confined to such portions as lie between lines vertically drawn downward through the end lines of the location. The question is thus sharply defined: 'Plaintiff claims that by reason of the strike of the vein in the Fulton location, the defendants have no extralateral rights whatever, while the defendants claim that they have such rights and are by reason thereof entitled to the vein in its downward course through the Smuggler territory.' "

The learned judge who rendered the opinion, then enters upon a somewhat exhaustive review of the cases involving the law of the apex, and concludes as follows: "In the case at bar no part of the Fulton vein runs parallel, or nearly parallel, with the side lines of that claim as staked upon the surface. The United States Supreme Court has said that if the locator of a mining claim mistakes the direction of his vein, and locates accordingly, the courts have no power to make a new location for him,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but must determine his rights with reference to the location actually made.

King vs. Amy & Silver Smith Consol. M. Co., *supra.*

Developments made subsequent to the location of the Fulton disclosed that the claim, as located, contains very little of the apex of the vein, and such as it does contain, does not cross either end line and does not run parallel, or nearly parallel, to the side lines; so that in no aspect of the law can the Fulton be allowed extralateral rights by reason of the apex of the vein."

In second Lindley on Mines (2nd Ed.), Section 584, the author reviews the case and at page 1001 he says: "It does not seem possible to assail this ruling of the Supreme Court of Colorado, or to concede any extralateral right to the Fulton claim upon the facts presented, without resorting to the equitable doctrine hereinbefore referred to, as having been repudiated by the Supreme Court of the United States."

(Not only was the patent for the Kempton Lot 55 issued, but the application therefor was made under the Act of 1872. The claim was entered and paid for on the 27th of April, 1874, as appears from the patent, and the claim was not surveyed for patent until the 29th day of August, 1873. Record p. 148.)

IV A.

But we submit, first: That the evidence introduced on behalf of petitioners, shows clearly that their so-called Kempton bedded vein terminates in its course downward before either the Fairview, Northern Light, or Jordan Extension Claims is reached. And second: That according to their own testimony, considered as a whole, the so-called bedded vein has no existence in fact, but that all of the ore which they seek to refer to this alleged bedded vein belongs to a series of northerly and southerly fissure veins, which veins, on their course or strike, cut opposite side lines of the Kempton Claim, thus depriving petitioners of any extra lateral rights whatever.

Petitioner E. A. Wall himself testifies at pp. 287-289, as follows:

"Q.—The north and south fissures, Col. Wall, are persistent are they not, in your opinion, in that country?

A.—They are.

Q.—Cutting the alternating beds of quartzite and lime, and cutting the porphyry whenever it is in their way?

A.—Many of them do, some may not.

Q.—I am speaking of these principal ones. The Ashland does?

A.—Yes, sir; it does.

Q.—It cuts the quartzite, lime and porphyry and everything else?

A.—Yes, sir.

Q.—And it is an ore bearing fissure?

A.—Ore bearing, yes, sir.

Q.—And the Sampson also cuts the country generally?

A.—The same.

Q.—And the quartzite and lime as far as possible to discover?

A.—Well, there were no developments on either the north or south to determine and no exposures at the surface to determine whether the Sampson fissure cut through them above or below or not. But I have no doubt that it does.

Q.—You have no doubt at all but that it goes right through the country generally just as the Ashland does?

A.—I think so.

Q.—And it is an ore bearing fissure?

A.—Oh, yes; it has been very productive; while I have done no mining in it, it has been very productive.

Q.—There is no doubt about it being ore bearing?

A.—None at all.

Q.—The Kempton fissure is about parallel to that?

A.—The Kempton fissures are all about parallel in strike, but the dip is quite different, the Ashland dipping at a much less degree of inclination, say about 70 degrees, whereas the other two are almost vertical.

Q.—The strike of the fissure found in the Kempton (incline) is about parallel with the other two?

A.—Yes, sir; apparently.

Q.—And in your opinion is that also a persistent fissure which cuts through the country?

A.—Apparently; yes, sir.

Q.—And is an ore bearing fissure?

A.—Very slightly mineralized so far as I have examined it, I never examined it, however, through the incline." * * *

And at p. 288:

"Q.—The ore that you found in what you call the bed vein, or bedded vein, had its origin in these fissures in your judgment?

A.—I think so.

Q.—It was deposited at the same time that the ore was deposited in the fissure vein; the solutions came up through these several fissures and deposited the ore in these fissures and out into the limestone in many places?

A.—I have no doubt that the entire deposition of ore, whether it extends out and takes the form of a bed, or that of a fissure, I have no doubt that the deposition was contemporaneous.

Q.—From the fissures?

A.—Came through the fissures, the solution did. I think that but for the fissure there would have been no mineralization whatever." * * *

The witness then proceeds to state at some length the reasons why he concludes something further was necessary to account for the ore bodies in the beds, and states that there is another fissure which has been produced by the intrusion of thin sheets of porphyry along the beds, and says (p. 289): "We find through a large ore body a sheet of porphyry varying in thickness from a foot or two at points to several feet; this sheet extends through and is enclosed within the ore body and within perhaps ten feet of the upper wall, * * * a sheet of porphyry

is followed in the west drift all the way out up that incline through the Turnsheet level east and west having a dip conformable to the dip and strike of the beds. However, the material on one side is ore. I don't know how thick it is on the other side. It is developed ten or fifteen feet, which to my mind suggests the intrusion of this thin sheet of porphyry before any mineralization between the bedding of the limestone, which again is crossed and intersected by the fissure, the Ashland fissure and the other fissure.

This intrusion produced a channel across the beds connecting with the fissure, which I think is necessary in order to produce or introduce the necessary circulation of the solutions, which we assume were the cause of the ore deposits. That circulation was through the fissure and the contact between the porphyry sheets and the limestone on both sides, and we find these enclosed in ore on both sides. The ores near the center line of the fissure bear the structure of the fissure some distance away from it.

Mr. W. R. Smith, a witness for the petitioners, also testified that these north and south fissures were persistent, and extended indefinitely south and north. See pp. 256-8. And none of petitioners' witnesses intimated a contrary opinion.

And Mr. Beveridge testifies, at pp. 243-44, that these north and south fissures were the sources of all the ore found in the territory in controversy.

And Mr. Morehouse, at p. 196:

"Q.—Do you think the bed vein is mineralized from the Ashland fissure?

A.—I do.

Q.—Entirely?

A.—Yes, sir; well I think that was one of the mineralizing agencies, as it was through that fissure that the mineralizing agencies were circulated and came out into the bedded vein. * * *

And at p. 197:

Q.—Therefore you must have of necessity the opinion that these so-called bed veins were formed at the same time?

A.—Quite likely.

Q.—And from the same source?

A.—Yes; I think so.

Q.—How many veins do you have within the limits of the country—that you have examined. * * *

A.—We have three fissure veins, that is, that are named.

Q.—How many that you call separate veins?

A.—Three, and the bedded vein.

Q.—Three besides the bedded vein?

A.—The beds are crossed by fissures running generally northerly and southerly, the Ashland being one.

Q.—The Ashland you call one vein?

A.—I call that a vein; yes, sir.

Q.—Do you want it treated and regarded as a separate and distinct vein in itself?

A.—I don't know how it ought to be treated. * * * It is certainly a separate structure. The ore is of a separate structure and has a different strike and dip to the ores of the beds.

Q.—Well, you have in your mind a conception of what is essential to constiute a vein, haven't you?

A.—Yes.

Q.—With that conception * * * do you regard the Ashland fissure as a vein that is to be treated as a separate and distinct vein from the other veins?

A.—Yes, sir.

Q.—And the bed then that you speak of, you also think should be regarded and treated as a separate vein, where it maintains its beded identity?

A.—Yes, sir.

Q.—The Sampson fissure; that is another separate and distinct vein?

A.—Yes, sir

Q.—And should be treated as such?

A.—Yes, sir. * * *

Q.—Now, what other veins have you within the limits of this territory that you think should be treated as separate and distinct?

A.—The Kempton Incline; the Kempton is on a fissure.

Q.—A fissure?

A.—A separate fissure.

Q.—A vein entirely separate and disconnected and nothing to do with the Kempton vein?

A.—Not disconnected, by any means, but joined to it at that place where you see—

Q.—Mr. Morehouse, is it a part of the bed vein, or is it a separate and distinct vein?

A.—It is a distinct vein. It is connected with the bed

vein the same as the bed vein is connected with the Ashland and with the Sampson fissure. * * *

Q.—We have now the Ashland, the Kempton, the Sampson and the Kempton Incline, four veins?

A.—No, sir; we have the Ashland, Sampson and Kempton. The Kempton Incline is on the Kempton vein, on what is called the Kempton fissure.

Q.—Is that a part of the bed vein?

A.—No, sir; it is the fissure vein and it is connected with the bed vein.

Q.—Is it a part of what you call the bed vein, or, being on the fissure, is it a separate vein?

A.—It is a separate vein, in places it joins the bed vein; *I don't know where you will draw that distinction.*

Q.—Where it is not in connection with the bed vein, is it a separate vein?

A.—It is a separate vein and fissure; yes, sir."

And Mr. Hannas (Record pp. 269-270) testifies as follows:

"Q.—Which was the most westerly north and south fissure that you have discovered in this country—Ashland?

A.—Yes, sir. * * *

Q.—And then you spoke also of the Sampson fissure?

A.—Yes, sir.

Q.—In your direct examination, and told us where it was. This work here marked "drift on Sampson fissure" is on that fissure? (Exhibit 20.)

A.—Yes, sir.

Q.—And did you go further north on the red level, that is, on the Sampson fissure?

A.—Yes, sir.

Q.—And the ore bodies running northerly to the place marked "lower stope and upper stope" (Ex. 21) are on the Sampson fissure?

A.—On the Sampson fissure?

Q.—You were down what is called the Kempton Incline?

A.—Yes, sir.

Q.—And that goes down lower in the fissure?

A.—Yes, sir.

Q.—And these three fissures are substantially parallel in their strike?

A.—Yes, sir.

Q.—In the Kempton ground, is the Kempton Incline fissure the most easterly fissure that you have, that you know anything about, running north and south?

A.—In our workings, that is the most easterly; yes, sir.

Q.—Is it your opinion also that the mineralization or the ore bodies that are found in this Kempton territory and Kempton workings, had their source in these north and south workings (fissures)?

A.—Yes, sir.

Q.—And all the ore that you have there came through one or the other of all these fissures and fed out into the lime in places?

A.—Yes, sir."

And Mr. Beveridge tells us that these several north

and south fissure veins are separate and independent veins, as is also the bed vein.

One would naturally anticipate that if the solutions proceeding from this trinity of fissure veins had intermingled and so deposited, from the most easterly to the most westerly fissure, one continuous mass of ore (see Morehouse, Record pp. 203-4), and thus given birth to a fourth vein, we would find the ores of the so-called bed and fissure veins, hopelessly entangled, and that it would be impossible of separation so as to refer one portion of the ore to one, and another to another, and another to the third, and another to the fourth of these veins. And we find that petitioners' witnesses were unable to fix any such separation, other than a mere arbitrary one.

For instance, the petitioner, E. A. Wall, (Record pp. 299-301) testifies as follows:

"Q.—Now, with the additional light which has led you to the conclusion that there are two veins here, the bedded vein and the fissure vein, can you tell us which of the ore bodies under the Fairview, Northern Light, Grizzly and Jordan Extension belong to the fissure vein, and which to the bedded vein, under which title you claim th

A.—That I suppose my attorneys can answer. As to the structural origin, I have marked a line already upon the map as to that portion which relates in its origin to the Ashland fissure; otherwise, it would be a bedded vein.

Q.—You understand, do you not, that you and your attorneys, by your answer, are claiming title to all the ore bodies under the Fairview, Northern Light, Grizzly and Jordan Extension?

A.—All the ore bodies which we have developed.

Q.—All you know anything about?

A.—All we have developed and all that we have claimed as having the apex within one or the other of the claims.

Q.—Do you not claim the ore under the Northern Light?

A.—Yes, sir; we claim all the ore developed by the apex of these two claims without reference to what the surface claim is, whether called Northern Light, Fairview, Grizzly or anything else; claim them all.

Q.—Now, those under the Fairview and Northern Light, under which title do you claim those; Ashland title or Kempton title?

A.—Chiefly under the Ashland title; that is, I will recall that answer, I beg your pardon—the division of the right as between the parties I do not undertake to pass upon.

Q.—I will put it in another way. You claim the ores under the Fairview and Northern Light where I am pointing, and in which we find stations 792, 793, 798, 796, that ore body out there, do you claim that is the Ashland or Kempton claim?

A.—What?

Q.—That ore body partly in the Fairview and partly in the Northern Light; which vein do you say that is in?

A.—We claim that is in the Ashland vein. We claim those in the Ashland vein.

Q.—The ore under the Jordan Extension, in which vein do you say that is?

A.—That portion of the ore which was found, which occurs in the bed to the east under the Jordan Extension, and a portion of it to the west, I understand a part of it belongs to the Sampson and a part to the Kempton.

Q.—Part to the Kempton and part to the Sampson?

A.—The stope is certainly to some extent, if not altogether, in the Sampson fissure.

Q.—You say then that you do not claim it under the Kempton bedded vein or Ashland fissure vein?

A.—Well, so far as the work has proceeded, there has been no occasion; the question of ownership is not controverted; because so far as the developments have gone, they are under the Ashland or under the Kempton, or nearly so.

Q.—Wait a minute; according to this map, these are the lines of the Jordan Extension and here is a large ore body out under the Jordan Extension; is that in the Ashland or the Kempton vein?

A.—Here is another line which you seem to have overlooked; here is the line of the Ashland and the ground in conflict with the Jordan Extension I think is embraced in the Ashland.

Q.—Now, the part lying easterly of the side line of the Ashland and under the Jordan Extension, do you claim that in the Kempton vein or Ashland, or in neither of them, or in the Sampson vein?

A.—I have not reached that question. However, when the question arises, I shall claim all ore that can be shown to be due to the bedding, to the ore found in the

bed, as suggested by this drift and that drift as being a part of the Kempton vein.

Q.—That part of the ore in the Sampson claim (fissure?) you do not claim?

A.—I am not called upon to give away anything and I have made no claim about it; there may be some other claim hereafter.

Q.—The ore in the Sampson fissure and beneath the Jordan Extension, a part of it is not in either the Ashland or the Kempton vein?

A.—At that specific point it may not be beneath the surface, but it may transpire however that the apex of the Sampson fissure may be in the Kempton; I don't know; we have not reached that question yet.

Q.—So you don't know whether you claim it or not? If you do claim it, I want to know by what title you claim it; what vein you think it is in. If you do not claim it I care nothing about it?

A.—I suppose that the papers filed are broad enough to show what we claim. We claim all we have asked for and have endeavored to prove it.

Q.—And, then, it will not be disputed that the answer claims the ore body to which I am directing your attention. That ore body lying vertically beneath the Jordan Extension and south of the easterly side line of the Ashland, in which we find the words "Upper stope" on this Exhibit 21, do you claim that that is either in the Kempton vein or the Ashland vein?

A.—I think the stope is in the Kempton vein; the upper stope extends out from the fissure, but there are two

stopes; there is a faint line beneath and then this hatched portion called Lower Stope; which I understand to be from this stope below the level of the tunnel. That stope I have said is clearly within the lines of the Sampson fissure.

Q.—Now, this is the upper stope as marked upon this map?

A.—I see it appears to be. * * *

Q.—Then it comes to this, so far as this working called the upper stope is concerned, you don't know whether it is in either the Kempton vein or the Ashland vein, or some other vein?

A.—I do not; I don't know that this drift or that drift which seems to be on the same horizon, I do not know that they are in the same beds these others are, because—"

Now, it is true, Mr. Morehouse—pp. 203-5—undertakes to fix arbitrarily, imaginary planes of division through one continuous ore body on a given level, by which he can distribute the ore bodies to the respective independent veins which enter into its composition.

Then we have the testimony of Mr. Beveridge with reference to the Turnsheet level (shown on petitioners' map, Exhibit 21) where, according to this witness, we have ore extending easterly and westerly, that is to say, with the strike of the beds, 420 feet, and in ore almost continuously from end to end. He tells us that the westerly 150 feet of this ore body is in the Ashland vein, thence proceeding easterly, without any break in the ore, he passes into the bed vein, and when he comes to station 409 he has ore which is in a fissure vein about a

foot in width; that then without a break in the ore he enters again in the bed vein and continues thereon until he encounters the Sampson fissure, where without interruption in the ore he passes from a bed vein into a fissure vein; that passing that he has about fifteen feet of limestone to near station 406, where a drift runs southerly in ore, and in a fissure, but he has not quite determined whether the ore in this drift is in a fissure or a bed vein; passing that and going still easterly, he is in a bed vein again until he comes to stations 404 and 403 at the bottom of the Kempton Incline, where the ore is again in a fissure vein, to-wit; the Kempton Fissure. (Record pp. 234-238.)

Conceding that there are three northerly and southerly fissures, as claimed by petitioners; that these fissures extend indefinitely to the south as well as to the north; that they are ore-bearing; that when they cut the Jordan lime belt the mineral solution proceeding from these fissures winged out or fed out easterly and westerly, depositing their metal contents in the bedding of the lime, from the most westerly to the most easterly of these fissures, thus depositing at intervals between the respective fissures, ore which is found conformable to the strike and dip of the limestone strata; that thus an ore body was formed, extending easterly and westerly as claimed, about 400 feet; that this 400 feet of ore is continuous and unbroken in its easterly and westerly direction, and that a portion of it belongs, to, and is a part of one of these nearly vertical northerly and southerly fissure veins; that another portion of

it belongs to and is a part of another of the northerly and southerly fissures, and that another portion of it belongs to and is a part of still another of such fissure veins, and that that portion of it which lies between these fissures is found to conform to the strike and dip of the limestone beds; and that this body of ore at the surface outcrops and extends in an easterly and westerly direction for the distance last mentioned:— Still we submit that it cannot be successfully contended that the portions of the ore body lying between the respective fissures and conforming to the dip and strike of the lime strata, are to be regarded and treated as a separate and independent vein; and yet, this is precisely the state of facts which petitioners' witnesses have testified to (as appears from their testimony hereinbefore quoted or referred to). The fissure veins would not, under such a state of facts, have lost their identity, where they traversed the limestone belt simply because within the limestone the mineral bearing solutions which came up through the fissures had deposited their metal contents in the limestone between the fissures, thus forming a continuous ore body from the most easterly to the most westerly of these fissures, and extending in length a few hundred feet only. On the contrary, the portions of this continuous ore body, which are found between the several fissures, are to be recognized and treated as part and parcel of the fissure veins in which they had their origin, and from which they were formed at the same time as the ores in the fissures themselves were deposited. The strike of the

fissures, under the facts as claimed by the petitioners, determines the strike of the vein.

Suppose we had three northerly and southerly ore bearing fissures, cutting across all three of the belts of limestone found in the neighborhood; that these fissures were ore-bearing throughout; that where they cut the three lime belts respectively, comparatively flat lying ore bodies were formed from the fissure solutions, and so was deposited a continuous ore body from the east to the west fissure. Would it be rational to hold that where the fissures cut each of the lime belts a new and independent vein had been formed with a course or strike at right angles to the fissure? We think not. From the earliest history of mining litigation in this country to the present day, we take it, no such theory as petitioners contend for here was ever before advanced.

That the theory is, to say the least, an absurd one, is recognized by counsel for petitioners in that portion of their brief in which they combat the claim of respondent that the Jordan limestone belt is a lode or vein.

At page 149 of their brief they say: "Take by way of illustration * * * the Ashland fissure which Mr. Tyler traced so correctly, *notwithstanding the interruptions of his counsel, the purpose of which was not at once apparent to the witness,* (record p. 433) and we find that when it occurs in the quartzite overlying the supposed limestone fissure, and through which it goes exactly as it does through the limestone, it is recognized as a lode. It there has the qualities of a lode; it is a deposition of mineral in a fissure in the quartzite, but when the same fissure,

opened by the same rending forces of nature, cut its way across the limestone and was thereafter mineralized by the same solutions and at the same time, the ore bodies within it and deposited by its means, cease to be a portion of this lode and became a portion of the broad lode which has no ore in it, save in and in the immediate vicinity of exactly this character of fissure and opening, and yet as the Ashland fissure passes on into the other quartzite, it instantly reassumes the quality of a vein, of which it was robbed by its passage through the limestone, where its enrichment was enlarged instead of being diminished, and then again when it passes into limestone, since that limestone does not happen to be the great Jordan lode, it continues and retains its character of a recognized mineral lode. What can be justly said of a theory that thus trifles with the plainest occurrences of nature, and the most unmistakable exhibitions of the continuity of ore, which is, as we have pointed out, the essential element in a lode."

(We direct attention to the record, p. 433, and in connection therewith the latter portion of page 439, in order that it may be seen just what justification there is for the reflection upon the witness Tyler and counsel who examined him, found at the outset of the above quotation.)

Again, at page 153 of their brief, it is said: "The main ore body is an unlargement laterally of the Ashland fissure, but is none the less absolutely a part of that fissure or lode. It would be remarkable if it could be successfully contended that the ore in the fissure could be called a lode, but that the ore which extends from this same body into the walls by the method of replacement is not the same

lode, although all of this ore is due to the same solutions coursing through the fissure at the same time, and is all deposited as the result of one and the same operation."

Now, it is unnecessary to cite authority in support of our contention that these north and south fissure veins, crossing as they do, according to the testimony of petitioners, opposite side lines of the Kempton, cannot be followed on their course or strike beyond the limits of that claim, and that petitioners could not claim any extralateral rights thereon which would reach any of the ore bodies beneath either of the four claims of respondent, the Jordan Extension, etc.

But this is not all; for according to the testimony of petitioners' witnesses the so-called bedded vein terminates on its course downward before reaching either of said claims.

Mr. Beveridge tells us that the so-called bedded vein does not extend northerly of the west drift, found on petitioners' map Ex. 21—that there is found the last remnants of it. His testimony is as follows, (record p. 242):

Q.—As you go into the ground from the surface, following down in the workings, where do you find the last evidences of the vein? In what level?

A.—The last evidence of the vein would be here.

Q.—In this little drift?

A.—No; along through here.

Q.—Didn't you tell us that that was all fissure vein, and tell us that it was 180 feet across? Didn't you say it was all a fissure from the station 512 to the west face of that working?

A.—No; I am taking this to the bottom.

Q.—That is all fissure?

A.—This is where it shows in this little raise that runs up from there.

Q.—Is there any raise there?

A.—There is a little raise, perhaps 10 or 12 feet.

Q.—Have you, outside of the ten feet of work east of station 512, any evidence of a bedded vein on that lower level?

A.—Outside of that at the station, no.

Q.—All the ore that you have seen on that level, in your judgment, is referable to the fissure vein?

A.—To the fissure vein.

Q.—So that so far as the explorations go, it would appear that at or above that level, there had been a complete union between the bedded vein and the several independent fissure veins which you have spoken of?

A.—It may be possible that the bedded vein has widened out from that point or the fissure.

Q.—Fissure widened out?

A.—Yes, sir.

Q.—The bedded vein is no longer discernable?

A.—Except at this point here.

And Mr. William R. Smith informs us, even when we get down to the turn-sheet level, there is but little of the so-called bedded vein left; that on that level practically all of the ore is in the north and south fissures. (See Petitioners' Ex. 21.)

At page 254 he testifies as follows:

Q.—Is there such a fissure there as the Sampson fissure?

A.—Yes, sir.

Q.—Tell us what openings you went through from the surface. * * *

A.—I went down the Kempton Incline. * * * I went down this incline. I went off through tunnels connected with the copper drift.

Q.—You went into the incline (to station 403) and you came to a stope, did you? (See petitioners' map, Ex. 21.)

A.—Yes, sir.

Q.—That stope is on the turnsheet level, is it?

A.—I believe it is.

Q.—That level is marked in yellow here on the map?

A.—Yes, sir; that is on the turnsheet level.

Q.—What did you find in here in the way of ore?

A.—There is a fissure there.

Q.—The incline goes down on the fissure?

A.—Yes, sir; goes right down on the fissure?

Q.—The turnsheet level at this point cross-cuts the beds, does it?

A.—Yes, sir.

Q.—What did you find there in that?

A.—Oh, there is very little ore. Once in awhile you will see a little in there. *When you get away from the fissure it gets lean until you get into another one, when it gets better.*

Q.—Now, from this point 404 on the turnsheet level

west, when did you first begin to strike ore in any quantity, if you do strike it at all?

A.—Why, on the turnsheet level I think we began to—I don't think we got much—any more from this bedded vein until we got over in here towards the Ashland fissure. The ore body seemed to make that way across these fissures, and headed for that fissure.

And having testified, at pages 256 and 257, to the existence of the three northerly and southerly fissures, namely, the Ashland Fissure, the Kempton Incline Fissure and the Sampson Fissure, he testifies at page 258 as follows:

Q.—And you say as you get away from these fissures the ore is leaner?

A.—It is, with the exception in this part of the country here, apparently here, the Ashland fissure seemed to be so much stronger than these other fissures, that the main ore body continued further and connected it further at the top. *As you go down it seems to be that the ore gets further apart, and you don't get much ore only where you go in a direct course with one of these fissures.*

Q.—So, of course, your opinion must be, I take it, that this country in which you find the ore, was (should be "was" instead of "was not," as found in record) enriched by these fissures?

A.—I think so—yes, sir.

Q.—And that the solution bearing the metals came up through one or the other of all of these fissures * * * And made out easterly and westerly in the adjoining ground and deposited the ores?

A.—Yes, sir.

Q.—And when you get near the surface, and for some distance below, it has been enriched from one to the other clear across, so that you have continuous ore near the surface itself, but do not seem to have as you get to a point further down?

A.—Yes, sir.

Q.—As I understand you, as you get further down it has the appearance of being more like three distinct veins?

A.—Yes, sir.

Q.—One on the Sampson fissure?

A.—Yes, sir.

Q.—One on the Ashland fissure?

A.—Yes, sir.

Q.—And one on the Kempton incline fissure?

A.—Yes, sir.

And (referring to this "west drift" shown in red on petitioners' Ex. 21, being the lowest workings of petitioners), this witness testifies as follows. (Record p. 250):

"Q.—Were you in the west drift?

A.—Yes, sir.

Q.—What did you find there?

A.—Why, I think there is ore from one end of it to there—to about here somewhere—20 feet of 512.

Q.—No. 512?

A.—No, about there.

Q.—What did you find at 512 north of that?

A.—I think they ran out into the lime there.

Q.—At what point do you reach the lime?

A.—Well, I think the ore begins to come in right near 512, and continues right on across it from one side to the other, and when you get about here, why you go right into the lime.

Q.—This cross-cut takes you out of the ore?

A.—Yes, sir.

Q.—Into the lime?

A.—Yes, sir; mostly limestone there.

Q.—What did you find on the west drift?

A.—Mostly limestone, when you get into it, one of these north and south fissures, and there you find an indication of ore.

Q.—In the fissure?

A.—On the course of the fissure; yes, sir."

And Mr. McNeill, at pp. 280-81 (referring to this same west drift), testifies:

"Between 18 or along about 19 (meaning station on the turnsheet level) there is a winze that comes down to what is called the west drift; that is it there. This winze is in ore all the way down; clear out to here it is lime rock and we strike some more lime rock there again; follow the ore clear out to this point, about here is where we strike it coming this way (meaning coming westerly from the Neptune Tunnel). The ore runs right along by the side here to this point 511 and 512. 511 is where we first struck the ore.

Q.—Where you first struck the ore when you were going in?

A.—Going in from the Neptune Tunnel; that is the west drift in the Neptune Tunnel. That is where we struck the first ore.

Q.—Going the other way what did you strike?

A.—We struck lime going out this way,—the country rock clear out around here.

Q.—That is clear out to the Neptune Tunnel?

A.—That is out to the main Neptune Tunnel."

Mr. Morehouse, at page 176, testifies: That this west drift is in limestone from station 510 to 507, Ex. 21. And at page 188 he says that this station 507 is near the Sampson fissure, being only a few feet westerly thereof. And at pp. 212 and 213, on cross-examination, he testifies:

"Q.—Now, coming down to the west drift, here is where you have your fissure 180 feet wide?

A.—That has the fissure structure out that far.

Q.—Is that 180 feet all referable to the Ashland vein, to what you call the Ashland vein, in your judgment?

A.—In my judgment, yes, sir.

Q.—No part of it belongs to the bed vein?

A.—Well, no; not up to 512.

Q.—Now, crossing to the work running along what is marked Neptune Tunnel southerly from station 507, back to 504, have you ore in there?

A.—I did not go back that far.

Q.—Didn't you speak about station 504 repeatedly?

A.—Probably I did; if I did I was mistaken.

Q.—You know that you did?

A.—Yes; I think so.

Q.—And weren't you back there?

A.—I think I was; I could not say.

Q.—Now, from 507 to 504 on this same level, west drift, have you ore?

A.—We have; there is some ore along the side of the tunnel in places. Now, I will describe it. In places some ore along that side of the tunnel and the tunnel seems to be, the ore seems to be standing there in the fissure form on the side of the tunnel. A little cut driven back of it, show little lines of ore running down into the bed and finishing. You cannot determine on that side of the tunnel of its being connected with the ore; I cannot determine what there is in beyond it, but it looks to be a slab of ore laying along with the tunnel.

Q.—What I want is whether the ore you have there is in your judgment in the bedded vein or fissure vein?

A.—I think all the ore there is there belongs to the fissure.

Q.—Sampson fissure?

A.—To the Sampson fissure."

And at page 155 of the brief for petitioners (referring to this same west drift) it is said:

"On the west side of the Sampson fissure, the west drift on the Neptune Tunnel level extends westerly through from 120 to 180 feet of barren limestone and then encounters the easterly limit on that level of the ore body in question in the Ashland fissure vein."

And at page 156-7 (referring to the United States Tunnel No. 1 West Drift, Exhibit 21), it is claimed that it is all in barren limestone, except at station 637, (which they claim to be on the line of the Sampson cross fissure,) and at station 781, where they claim the Ashland fissure was encountered. What has become of the so-called Kempton bedded vein? If we look alone to the testimony

on behalf of petitioners, it has ceased in its downward course before reaching either of said four claims of the respondent?

It is manifest that petitioners, if the testimony of their own witnesses be accepted, have no extralateral rights whatever by virtue of their ownership of the Kempton. *IV. C.*

Now, how does petitioners' case stand upon their claim of extralateral rights on the Ashland fissure vein?

In their amended answer, at page 32, they allege that a large lode or vein of mineral, earth and rock in place, containing gold, etc., exists and is found throughout more than 900 feet in length of the Ashland Claim; that this vein in its strike passes through the southwesterly end line of the Ashland, and has its top or apex within the side lines thereof, through the entire length aforesaid; that the course or strike of said lode *is nearly or quite parallel to the side lines of the Ashland;* that said lode or vein departs from a perpendicular in its course downward at an inclination from the horizon of about 70 deg. in a northwesterly direction, and, on its dip, passes out of and beyond the northwesterly side line of the Ashland, but within protractions of the end lines thereof and so continued in their own direction indefinitely that they include the part of said lode which lies between vertical planes drawn downward through said end lines; that said end lines intersect the exterior part of said lode or vein on its dip beyond the northwesterly side line of the Ashland and under the surface ground, known as and called the Grizzly, the Northern Light and the Fairview Claims.

And at page 10 of petitioners' brief it is said: "It was and is further claimed by the defendants that the Ashland lode and vein, at its apex or outcrop, in its course, crosses the southerly end line of said Ashland Claim, and extends northerly within the surface lines of said claim a distance, as disclosed by workings, of more than 900 feet, at which distance the apex is no further discernable or disclosed at or near the surface, but by the direction and dip of the vein, and the location of the apex so far as traced, *it appears that it extended thus northerly through the northerly end line of said claim*, so that the apex of said Ashland vein extends, either as demonstrated by actual workings, or by the necessary inferences from its position, *between the side lines of said claim and across both of the end lines thereof*, and that it thence dips upon its descent into the earth in a westerly direction at an angle of about 70 deg. from the horizon underneath the surface of the Grizzly, Northern Light and Fairview Claims."

This statement is far too broad. It appears from the testimony of petitioners' own witnesses, in connection with their map, Ex. 20, that this vein does not cross both of the end lines of the Ashland, nor continue within the side lines thereof, for a distance of 900 feet from the southwesterly end line thereof, but that on its course and strike, it crosses the *patented* northwesterly side line of the Ashland at a point less than 600 feet distant from the southwesterly end line of the claim, and thence on its course and strike crosses the southeasterly side line of the Northern Light, as patented, and there enters territory which was by the Ashland patent excluded to the North-

ern Light, and thence continues on its course slightly east of north, to and beyond station 911 (petitioners' Exhibit 20) and is pursuing a course northerly, which continually carries it further away from the Ashland, and which, if continued, would carry it across the northwesterly side line of the Northern Light Claim.

For instance, Mr. Morehouse testifies as follows:

"Q.—Now, confining yourself to the Ashland Claim first, what, if anything, did you observe on the Ashland Claim in the way of a fissure, and what was its direction, and what was its extent in length and width?

A.—I observed the fissure shown from the southwesterly end line by underground workings and strippings, from there up the hill upon the surface, the strike of which was northerly, east of north magnetic a little, for a distance of probably eight or nine hundred feet." (p. 173).

And at pp. 178-181:

"Q.—Well, now, coming to this map (Ex. 20), did you examine the surface after examining the underground workings?

Yes, sir.

Q.—What examination did you make, where did you commence, and what did you find?

A.—I saw a tunnel driven northerly from a point about 115 or 120 feet from station 905. My recollection is that the tunnel was about 150 feet in length driven on the fissure. * * * The fissure showed in the end of the tunnel and along the roof in places where it had been stoped so high that you could not see the roof. There is

above the mouth of that tunnel upon the hill here, about 70 feet northerly, a shaft * * * and the fissure shows crossing the shaft. * * *

Q.—Now, proceeding from the shaft northerly, what did you observe?

A.—There is a trench stripped along from the shaft northerly to station 907. At station 907 there is a similar excavation, apparently an old one, a small one. Then the stripping goes on. * * * The stripping is from 907 to about 20 feet northerly of station 909. From station 909 there is no stripping, but there are excavations marked 'large excavations,' and another excavation between and at the end of the stripping several little openings showing a fissure. There is a tunnel about 60 feet, or maybe 75, over to station 910. It is not on this map. * * *

Q.—I will ask you whether ore is exposed along that stripping or cut?

A.—Yes, sir; all the way. Anybody can see it.

Q.—Where the stripping ceases what are the appearances then as to the vein upon the surface?

A.—After the stripping finishes—the stripping disappears and it is stripped over into the limestone a little ways. The upper lime, lying above this quartzite that I have described at the beginning, the stripping being in ore along to station 906; and over at the line of these old excavations is nearly the line of the contact of the upper quartzite and limestone. * * * On the north side of the hill the fissure appearance is very wide; all of these marked 'large excavations' shows fissure structure as

well as the mouth of the tunnel and works underground in that tunnel southeasterly from station 910 in the large excavation and other cuts here showed fissure structure, showing it to be very wide in that belt of limestone. * * *

Q.—What is the distance from the southwesterly end line of the Ashland Claim to the end of the surface tracing that you made?

A.—Well, about 800 feet."

(All references are to Exhibit 20.)

And on cross-examination, at pp. 195-6, the witness testifies:

Q.—Coming now to the Ashland fissure that you testified about in direct, can you tell us how far you have traced it upon the surface, from what point to what point?

A.—From the end line of the Ashland, southwesterly or southerly end line of the Ashland.

Q.—Well, where to?

A.—To a point somewhere about 911.

Q.—You believe that the fissure that you find in the work on this Exhibit 20, marked "old cut" (should be open cut) and in which the elevation 1498 is found, is on the same Ashland fissure that you found at the southwesterly end line?

A.—I think it is a part of the Ashland fissure. I think it is very wide there, and I think that is a portion of it that is exposed there.

(This station 911 is shown upon Exhibit 20 within a few feet of the northwesterly side line of the Grizzly

Claim, and the work there shown, marked "open cut," is wholly outside of the Ashland, as patented.)

* * *

Q.—Have you any doubt that the fissure extends on beyond the point marked open cut?

A.—I don't know that it does; I believe it does.

Q.—You believe that it will continue?

A.—Yes, sir; I do.

And at page 215 the witness testifies:

"Q.—The Ashland fissure crosses both side lines of the Grizzly claim, does it not?

A.—It would as laid down there—is this the Grizzly?

Q.—Yes?

A.—Yes; it would cross both side lines."

And Mr. Hannas, also a witness for petitioners, testifies on cross-examination, pp. 266-7, as follows:

"Q.—Now, you are the foreman of the Kempton Mine, are you not?

A.—Yes, sir.

Q.—And this stripping on the Ashland vein, as shown on Exhibit 20, was done under your direction?

A.—Yes, sir.

Q.—Generally as to that you can probably give me better information than any other witness. I will ask you to start at the most southerly place where you have the Ashland vein appearing at the surface, in your opinion?

A.—It is shown in the face of this cut, marked 'Excavation A,' (should be 'excavation and cave'). * * *

Q.—Now, going northerly from this place where you

have it located you take it up again near station 906 at the point marked 'caved shaft?'

A.—Yes, sir.

Q.—And you follow it up to station 907?

A.—Yes, sir; on that fissure all the way. * * * And follow it continuously from 907 to 909 and on to the end of that stripping as shown there.

Q.—And then going on to the place marked 'large excavation,' at the northerly end of which is station 910, we have that same fissure passing through that working?

A.—Yes, it is apparent from here on. You can see it from the surface. It is underneath the surface there.

Q.—From station 909 on through to the place marked 'large excavation,' this is the Ashland fissure and is traceable on the surface?

A.—Yes, sir, without any stripping at all.

Q.—And then you pass out of the large excavation and can trace it on the surface up to the place marked 'old cut' (should be 'open cut')?

A.—I think I can. I have not examined it very closely, but there is evidence of the vein through there.

Q.—You mean the Ashland fissure vein?

A.—Yes, sir.

Q.—And do you trace it to the northerly edge of that old cut, passing on through?

A.—I think so.

Q.—And then you trace it on the same course exactly, it is found still further to the north?

A.—I have not tried it.

Q.—You have no doubt but what it does continue clear across?

A.—I have no doubt but what it continues clear across.

Q.—About in the direction you have traced it thus far?

A.—Yes."

And Mr. James W. Neill, called by petitioners in surrebuttal, testifies at page 513, that he knows what is called the Ashland fissure, and that he believes the Northern Light fissure is a continuation of this Ashland fissure, a continuation north.

Thus it appears from the testimony introduced by the petitioners themselves, read in connection with their own map, that the Ashland vein, on its course or strike, departs from said claim, crosses the northwesterly side line thereof, cutting both of the side lines of the Grizzly, and pursuing a course which, if the vein continues, would carry it also across the northwesterly side line of the Northern Light Mining Claim. And if the Northern Light and Grizzly Claims are correctly laid upon respondent's maps, we would have the same result, except that the Ashland vein would depart from the territory patented to the Ashland vein, at a point considerably nearer the southwesterly end line of the claim.

(We have under another head presented the evidence, and said all we desire to say in support of the correctness of the respondent's maps in this regard.)

Mr. Tyler traced upon respondent's map, Exhibit "T," the course of the apex of the Ashland fissure, testifying at page 439 as follows:

"Q.—Now, I want you to trace, if you will, upon this

map, the Ashland fissure at the surface; . . . have seen the tracing upon the defendants' map, have you, as exhibited?

A.—I believe so; they are practically the same as ours. * * * The cropping of the Ashland fissure would be disclosed by these surface cuts, S 40 and S 36; and then near station 37 and so on, I call that the cropping. This is stripped down. From station S 37 two branches of the cropping have been developed apparently. One is within the Northern Light claim about there, 20 feet from this point S 49, 20 feet northerly from S 49, and thence on about as indicated; thence on about as indicated by the lines of the map, which would go to the Old Jordan, again proceeding northerly, this point you spoke of being 20 feet northerly—20 feet westerly of that I should say, and then went northerly.

(The witness here made a line on the map with red pencil.)

Q.—That is about as you would place it?

A.—Yes, sir."

It is said by petitioners that the dotted line so placed upon the map by Mr. Tyler is not accurate; "That the tracing work shown upon petitioners' Exhibit 20 continues beyond the point where the dotted line leaves that working to a point upon the Ashland northwesterly side line at the easterly opening or portal of the Grizzly discovery cut, some 20 feet at least beyond the point where the dotted line would indicate its crossing this side line."

Petitioners, however, called no witness to controvert this testimony of Mr. Tyler. If at the point stated by him,

two branches of the vein are developed, the northwesterly of these branches is the one which would first depart from the Ashland and enter Grizzly and Northern Light territory. Now, if any of the ore bodies found beneath the Northern Light, Fairview and Grizzly claims, northwesterly of the northwest side line of the Ashland, belong to the Ashland fissure vein, it is fair to presume, we take it, that they would be found in this most northwesterly branch of the vein. This would be so of necessity unless this northwesterly branch did not continue on its course downward far enough to reach them, or unless the southeasterly branch, on its course downward, intersected and cut through the northwesterly branch on its dip, and then continued downward so as to take in such ore bodies. There is, of course, nothing in the evidence to show any such occurrence as this.

At page 105 of petitioners' brief, speaking of this testimony of Mr. Tyler, it is said:

"It is somewhat singular that these observant, intelligent and trained experts could not be more definite or exact concerning a matter which was expressly intended to be made of important service under certain contingencies which was foreseen might happen in the progress of the trial."

Counsel cannot be unmindful of the fact that the burden of proof in this matter rested upon the petitioners. It was they who were seeking to pass beyond the vertical boundaries of their own claim and enter beneath the surface of their neighbor's territory, under a claim of extra-

lateral rights, and if they left the matter in doubt their defense failed.

It appears that the Grizzly Mining Claim was located on a vein which also crossed its opposite side lines. (Testimony of Mr. Tyler quoted in petitioners' brief, pp. 102-3.)

Both the Northern Light and the Grizzly Mining Claims were senior to the Ashland. No evidence was offered to show the date of the location of either the Ashland or Northern Light, but it appears from the Northern Light patent (record pp. 39-42) that that claim was entered and paid for on the 20th of October, 1874, while it appears from the patent of the Ashland (supplement to record, p. 3 et seq.) that that claim was entered and paid for on the 6th day of May, 1875. The Grizzly Mining Claim was located on June 7th, 1870. (Record p. 55.)

Such being the state of the case, what, if any, extralateral rights have petitioners upon the Ashland vein, which would entitle them to claim any of the ore bodies in controversy?

It will be noted that the southerly portion of the Ashland in its entire width is in conflict with the Kempton Claim, and that this conflict is by the Ashland Patent excluded to the Kempton. The Kempton, therefore, takes all that part of the Ashland vein on its strike which is found within its surface boundaries, and hence, as to this, all other questions aside, the Ashland can have no extralateral rights whatever.

They are not entitled to any of the ore bodies beneath the Fairview, because there is no evidence to show that

the ores beneath that claim belong to the so-called Ashland fissure vein.

Mr. Morehouse, in sur-rebuttal, at pp. 510-511, testifies on cross-examination as follows (referring to the ore body marked "No. 1 B" on respondent's Exhibit S, which is the only developed ore body under the Fairview):

"Q.—Don't you know that the ore there is dipping to the east?

A.—The ore dipped to the west, at the point where the drift shows where this branch from the west drift cuts it.

Q.—There is a large body of ore there?

A.—Yes; there is.

Q.—Speaking of ore bodies as a whole now, I mean generally?

A.—Yes.

Q.—Not taking some little local point, it dips to the east, does it not?

A.—I could not say that it did. The ore as I saw it there dips to the west. That ore structure is in the fissure form, and dipping to the west at near point 739, very plainly shown.

Q.—You do not undertake to identify any fissure you found there as the Ashland fissure?

A.—I found the ore in the fissure form, that is all.

Q.—That is, the Ashland fissure if it preserved its dip as you have observed it elsewhere, when you get to that level, would be west of that ore body?

A.—I have made no calculation. The ore is plated and has a *different structure from the Ashland fissure ore bodies.*"

And Mr. Tyler, on cross-examination, p. 447, testifies:

Q.—Now, the isolated ore body in the Northern Light (a part of which ore body is also under the Fairview) is near the fissure, the Ashland fissure, is it not?

A.—Well, from the fact I did not find any fissure in there, I do not consider that it is near the actual (Ashland?) fissure.

And at page 462 he testifies: That the Ashland fissure, wherever exposed, dips to the west, and that this ore body dips to the east in a reverse position, at an angle of 45 or 40 degrees.

And Mr. Palmer, at page 412, testifies:

Q.—Now, directing your attention to the work upon the same level, in the vicinity of where stations 876 and 793 are found, have you ore there?

A.—There is ore along there and also here going down the incline.

Q.—The incline marked No. 1 B?

A.—No. 1 B is the station, that ore occurred. * * *

Q.—That ore body according to the map and your testimony, lies partly under the Fairview and partly under the Northern Light?

A.—Yes; but it is on the dip of the Jordan Lime, on the dip of the lime lode. * * *

Q.—The ore that you have here at the place last referred to is in the limestone?

A.—It is in the Jordan limestone.

Q.—Is it conformable there or not to the strike and dip of the bedding?

A.—Well, it may not there fully conform to the strike and dip, but as nearly so as the most of it. There are places where there are some twists in the rock, where there is a folding of the leaves of the limestone and the quartzite bodies and then there will be some variation of course from the normal dip and strike.

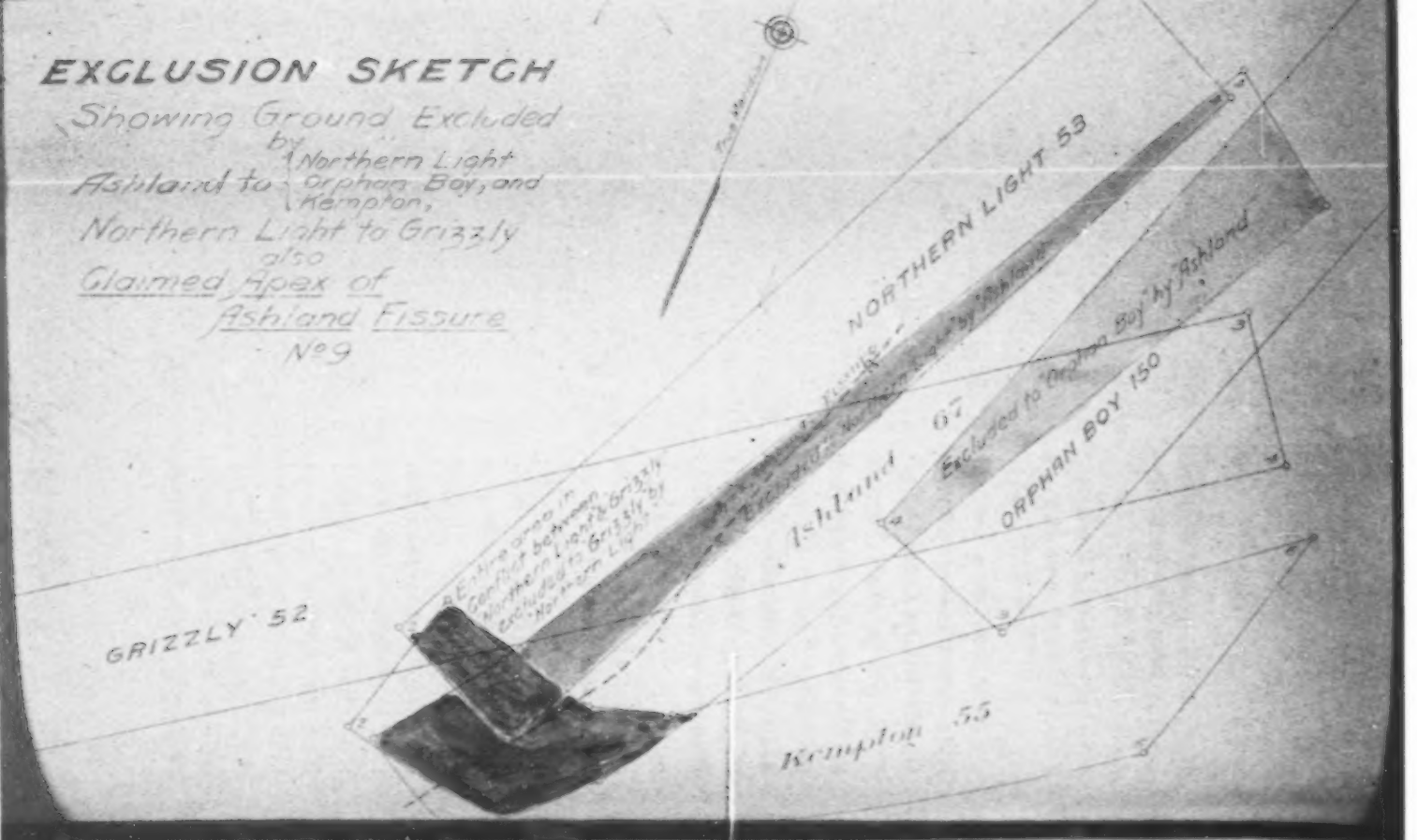
Furthermore, it appears from the testimony without contradiction, that there is about 600 feet of undeveloped country between the apex of the Ashland fissure and these ore bodies underneath the Fairview and Northern Light. It cannot, therefore, be conjectured even that these ore bodies are in the Ashland vein.

In Con. Wyoming M. Co. vs. Champion M. Co., 63 Fed. Rep. 540, the compiainant was seeking extralateral rights on what was called the Slate Vein, and at page 550 the court says:

> "But here we are met with the difficulty of determining from the evidence how far the apex of this vein is shown in the Ural Claim after leaving the south end line of the Wyoming surface location. This is the most difficult and doubtful question of fact that is presented to the court for its determination. The testimony as to the existence of the slate vein to certain points southerly, near the mouth of the Wyoming shaft, may be said to be fairly established by the evidence. South of that point to the southerly end of the Ural, it is not well defined and is not clearly proven. The court is left in doubt as to the truth. The impression received from an examination of the record might be said to be that the probabilities are in favor of that vein extending through the Ural ground, as claimed by complainant. But the court is not prepared to say

EXCLUSION SKETCH

Showing Ground Excluded by Ashland to Northern Light, Orphan Boy, and Hampton, Northern Light to Grizzly also Claimed Apex of Ashland Fissure No 9



> that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Years' and New Years' Extension Claims belonging to respondent."

Now, how does the case stand as to the ore bodies lying beneath the surface of the Northern Light and Grizzly Mining Claims?

It will be observed that all the conflict area between the Northern Light and Ashland Mining Claims was by the Ashland patent excluded to the Northern Light, (see Ashland patent, supplement to record, p. 3, et seq.) and the Northern Light patent in turn excluded all the conflict between it and the Grizzly Claim to the Grizzly. (See patent to Northern Light, record, pp. 39-40.)

(A map upon which the lines of all of the claims of the parties are laid, is somewhat confusing and it cannot be readily seen therefrom just what the boundaries of the conflicting area between the Ashland and Northern Light and between the Northern Light and Grizzly are. The diagram opposite this page, entitled "Exclusion Sketch, etc.," has therefore been prepared to simplify this matter. On this diagram the conflict area between the Northern Light and Ashland, and excluded from the Ashland patent, is colored gray, and marked, "Conflict excluded to Northern Light by Ashland," while that between the Northern Light and Grizzly and conceded to the latter by the Northern Light patent, is uncolored and marked, "Entire area in conflict between

Northern Light and Grizzly excluded to Grizzly by Northern Light." (This diagram also shows what is excluded by the Ashland patent in favor of the Orphan Boy, which is colored green and marked "Excluded to Orphan Boy by Ashland," and that which is excluded by the Ashland patent to the Kempton Claim is colored blue and marked, "Excluded to Kempton by Ashland," while that excluded by the Kempton patent to the Northern Light is colored red and marked, "Excluded to Northern Light by Kempton.")

The diagram also shows the apex tracing on the Ashland fissure as indicated by Mr. Tyler on map Exhibit S. And thus at a glance may be seen where the fissure enters and departs from the Ashland, where it enters and departs from the Grizzly and also where it enters and traverses in part the Northern Light.

Now, to the extent that the Ashland fissure vein on its course or strike and at its apex is found within the Northern Light Claim, the owners of the Northern Light, have intralimital rights thereto, as it goes to the deep, and the owners of the Ashland, claiming under a junior title, cannot encroach thereon.

And as to the Grizzly, it was located upon a vein which crossed its side lines. Its located side lines therefore became its legal end lines, and it also appears from the evidence without contradiction that the Ashland fissure vein crosses the side lines of the Grizzly. If, therefore, the owners of the Grizzly Claim were claiming extra lateral rights on the Ashland vein,(as opposing counsel seem to understand), they would be entitled thereto, be-

tween planes drawn vertically downward between these located side lines and legal end lines.

Walrath vs. Champion M. Co., 171 U. S. 293;

Jefferson M. Co. vs. Anchoria L. & L. Co., 32 Colo. 176.

But this is a question with which we are not concerned in this case. Respondent is insisting only upon its intralimital rights as to this claim as well as to the other three of its four claims. The title thereto rests upon a location which antedates the entry of the Ashland. It is, therefore, entitled within its exterior boundaries to all of the Ashland vein, as it goes to the deep, so far as the same is found on its course and strike and at its apex within the surface boundaries thereof.

So far as the intralimital rights of the Northern Light to all that portion of the Ashland vein as it goes to the deep, the strike of which at its apex is found within its boundaries, and also the intralimital rights of the Grizzly to all that portion of the Ashland as it goes to the deep, the strike of which at its apex is found within the boundaries thereof, the case is precisely the same as that of Tyler vs. Last Chance, 157 U. S. 683.

The diagram accompanying the decision shows that the Tyler had the apex of the vein which crossed one of its end lines and departing through a side line thereof, entered and crossed the side lines of the Last Chance Claim, and the ore bodies there in controversy lay within the *located* side lines, the *legal* end lines of the Last Chance, and also lay between planes extended in their

own direction and drawn, one through the end line of the Tyler, which was crossed by the vein, and the other parallel thereto, through the point where the vein departed across the Tyler side lines.

The court held that it had been adjudicated in a former action between the same parties that the Last Chance Claim was the senior and the Tyler Claim the junior location, and that, as a consequence, the Last Chance was entitled to all of the vein found between planes drawn through its located side lines.

In petitioners' brief, page 169, it is said that the logical effect of respondent's position is that it admits, first, the fact that there is a lode in the Ashland fissure, substantially as pleaded in the answer of the Ivanhoe Mining Company. Second, that this lode crosses the Grizzly Claim by passing through its side lines and it is one of its secondary veins or lodes. Third, that the discovery or primary lode on which the Grizzly discovery and location was made, also crosses the Grizzly Claim by passing through its side lines, and its side lines thus become its end lines. And, fourth, in virtue of the fact that the Ashland lode crosses the side—end lines of the Grizzly Claim, the respondent has the extra lateral right, covering the ore body in dispute, over the owners of the Ashland Claim.

An all sufficient answer to this, is that the respondent is not claiming any extra lateral rights whatever on the Ashland vein, as the same is found in the Grizzly Claim. It is asserting only its intralimital rights thereon.

It was also charged in petitioners' brief that respondent in making the claim which it does with respect to the

Ashland vein, is guilty of an ignominious surrender, driven thereto by fear of the case which petitioners had made. This conclusion is hardly justified. Respondent claims, as it always has claimed, that none of the ore bodies in controversy are found in or belong to the Ashland fissure, but that all of them are in and a part of the broad vein or lode of limestone bounded by its quartzite walls. But respondent says to petitioners: "While we insist that none of the ore bodies in question belong to your Ashland fissure vein, yet if we were to concede what you contend for, still your Ashland fissure vein so traverses the Ashland, Nqrthern Light and Grizzly Mining Claims as to deprive you of all extra lateral rights thereon, which would embrace any of the ore bodies lying beneath the Grizzly or Northern Light Claims.

Here the respondent might safely rest its case. If we look to the evidence introduced on behalf of petitioners alone, it is, we submit, apparent that petitioners failed to establish that they were entitled to any of the ore bodies in controversy. They failed to establish that they were entitled to any extralateral rights which would reach any of such ore bodies.

In the Circuit Court and in the Circuit Court of Appeals, the same positions were taken and the same contentions made on behalf of respondent that have thus far been here stated and discussed.

In the Trial Court and in the Circuit Court of Appeals, respondent also contended that all of the ore bodies in question belonged to and were a part of a broad lode or vein, to-wit: a belt of limestone lying between

quartzite walls or boundaries. And the Circuit Court of Appeals, without discussing the question whether or not petitioners had failed, upon their own theory of the case, to establish extralateral rights on the so-called Kempton vein, or upon the Ashland vein, which would include any of these ore bodies, rested its decision solely upon the ground that respondent's contention as to what constituted the lode in which these ore bodies were found, was established by the evidence, and that the Jordan Lot 64 and the Mountain Gem Claims, owned by respondent, were laid upon the course of this broad lode, each including a portion of the width thereof at its apex; that these claims respectively were senior to the claim of the Kempton, which was also in part laid upon the broad lode, and as a legal consequence, petitioners were not entitled to extra lateral rights thereon which would include any of the ores beneath the Jordan Extension, Northern Light, Grizzly or Fairview Mining Claims, but that such extralateral rights did attach to respondent's Jordan and Mountain Gem Claims.

Now, in the brief for petitioners, the statement is repeatedly made that the Circuit Court of Appeals, in reaching the conclusion that this limestone belt constituted a lode or vein, fell into manifest error, into which it was betrayed by the misrepresentations on the part of respondents' witnesses as to the actual position of the limestone belt and the occurrence of ore therein, and as to the position of the said Jordan and Mountain Gem Claims, with reference to the limestone. (Petitioners' brief, pp. 94, 95, 97, 96, 100, 119, 120.)

Now, lest it might be concluded that these statements are confessed or admitted, if no effort be made to meet and answer them, we will consider the evidence on behalf of respondent in rebuttal and the law applicable thereto, as we understand it to be.

V.

RESPONDENT'S CASE IN REBUTTAL.

(a) *The contention of respondent that the Jordan Lime Belt constitutes a lode or vein and that all of the ore bodies in question lie therein, does not have to seek support in mere theory or fanciful speculation, but is found to be impregnable when tested by the facts which are either undisputed or which are established beyond reasonable controversy.*

Respondent's claim is that there is but one lode or vein to be dealt with, and that it includes all the ore bodies in dispute; that the ores in the so-called vein or veins of the petitioners are but some of the many ore bodies which are found in the great lode, and constitute but a small part of that lode; that in the field covered by the testimony in the case there are found three parallel belts of limestone with alternating beds or belts of quartzite coursing east and west magnetic and dipping to the north at from 15 degrees to 40 degrees, subject, of course, to some local variations both in strike and dip. The middle of these three belts of limestone, or the so-called Jordan lime, is the only one with which we are especially concerned. This belt of limestone has a minimum width of about 100 feet, a maximum width of about 200 feet, measured perpendicularly to the plane of the dip, and

has been followed easterly and westerly for more than three miles and, speaking generally, has been mined and developed throughout that length; it is bounded, or included, between a footwall of quartzite from end to end and a hanging wall of quartzite and porphyry, the quartzite constituting the hanging wall for about 90 per cent of the entire length; the included limestone belt being a much more friable rock than the enclosing quartzite, was in the process of mountain building, or tilting from its original horizontal to its present position, broken, crushed, fissured and shattered throughout its entire extent; the shattering and fissuring within the lime belt itself was such as to permit the access and circulation of mineral bearing solutions coming from the deep; it has also been chemically altered as well as mechanically, and so extensive has the alteration been that the original stratification has been almost entirely obliterated, there being but few places, and those covering but very limited spaces, where there is any evidence left of the original bedding planes; in places it has been converted into almost pure marble; the mineral and metal bearing solutions circulating through the much fractured and fissured lime belt have deposited their ores and accompanying gangue minerals, chiefly silica or quartz, by a process of impregnation or metasomatic action; the mineralization has been so general and extensive throughout this lime belt, that it is not possible to regard it other than as one great lode or vein.

Our contention also is that after this lime belt had been thus mineralized, it was broken or faulted in its

course lengthwise a little west of the mouth of the Ashland tunnel, where an enormous eruption of porphyry is found, and the western portion of the lime belt has been thrown to the north a distance of about 800 feet, or the eastern portion relatively thrown south a like distance.

Still later the system of north and south fissures, of which the Ashland is one, cut the country, including this limestone belt, but had little or nothing to do with the mineralization thereof.

Passing now to respondent's evidence, Mr. A. F. Holden, at p. 323, testified that this particular lime belt is followed practically straight across the district, starting from the Salt Lake Valley on the east and terminating in the heart of the Oquirrh mountains on the west, a total distance where it is known, worked and identified for about three miles; that out of this belt of limestone close to 80 per cent. of all the ores shipped out of Bingham in its nearly forty years of existence have come (pp. 323-4); that its dip varies from 15 degrees to possibly 40 degrees; that the underlying or foot wall rock of the Jordan lime is quartzite throughout its entire distance; that the hanging wall is quartzite nearly all the distance, there being some porphyry intrusions. At p. 326 he gives the width of the lime belt as already stated, and Mr. Tyler at p. 429 and Mr. Palmer at p. 415, testify to the same effect as to width. Speaking of the extent to which the limestone belt has been altered, Mr. Holden says, at pp. 324-5: "This lime belt which was originally horizontal, has now in the process of mountain building been tilted up, and in tilting it is cracked, crushed, broken and shattered within itself, and

left a mass of entwining and interlacing fissures, running across the lime, running with the lime, and running in other directions, they run in various directions and there are many thousands of them. * * * Great areas of the belt have been wholly replaced with quartz, with sulphides, with iron, copper, lead and zinc, which afterward may have been altered by surface action; other sections have been metamorphosed until the entire bed structure has disappeared, and great regions of it have been silicified. * * It is with great difficulty we can find the original stratification. It is shown in certain places for short distances. * * * In many places we find the limestone crushed so that it is in small fragments—may be even sand, but it is usually in larger fragments. At times we have great difficulty in driving a drift through it, or in carrying stopes up against such material as that. The material is so crushed and broken in many places that it will run right into the drift, and we have to do what we call dry lagging to prevent it. * * * The belt is almost wholly broken up into blocks throughout its entire extent, and these blocks are also of great annoyance to us in working."

And Mr. Tyler, at p. 433, describes the extent to which the lime belt has been metamorphosed, saying: "The limestone is excessively altered and metamorphosed, large regions of it especially in the neighborhood of the ore deposits are turned into marble, some of it very coarse and crystalline and some of it ground fine, and it is mechanically metamorphosed, too; that is, shattered to an extreme extent, and it has been also re-cemented, and the effect has been to almost entirely destroy the original

bedding planes, that there is rarely to be seen indications of them."

And see also Mr. Palmer on the same subject at p. 407.

Mr. Holden also testifies that there are many places within the limits of this lime belt, so far as the same is covered by the 80-foot map, or Exhibit "BB," where ore can be traced continuously across the belt from footwall to hanging wall. And at pp. 326-334, he indicates, starting at the east end and going westerly, the places where such tracings are found.

No. 1 was through the Black stope, where he says the ore and quartz extended from the hanging to foot, straight across the vein, with no lime left or shown. (P. 326.) No. 2 is just east of where the words "Good Fortune" are: "There is a section there wholly through quartz and large ore bodies," which he followed foot by foot without encountering any lime. (P. 326.) No. 3 is a tracing diagonally across the lode, of which the witness says: "There are diagonal tracings through which I can follow in ore all the way from the section near the Black stope, I have spoken of, to near the 'Good Fortune' that I can follow across from the foot to the hanging; and in addition to that, there are many local ore bodies away from this tracing, * * * within the lime wholly." (P. 327.) Of No. 4 the witness says: "The next section where it shows ore and quartz from the hanging to the foot is through the region known as the Niagara Mine, near the letters 3639 in black, near the word 'Vindicator.' There is a section there that can be seen on the surface. It goes from the

hanging to the foot through an old stope right on the surface * * * from the hanging to the footwall." (P. 327.) It will be noted that there is a stretch of country between this last tracing and the next we come to which is undeveloped.

Of No. 5 tracing the witness says: "There is a place called Utah Open Cut on the claim marked Sturgis 62, that has been stoped from the hanging to the footwall." (P. 327.) Of No. 6 tracing the witness says: "The next is just east of the east end line of the Jordan 64; there is a great big open stope there that can be seen on the surface and where the ore extended from the hanging to the foot without interruption." (P. 327-328.) Of No. 7 he says: "Going further westerly about 200 or 250 feet we strike first class ore practically from the hanging to the foot right through big stopes." (P. 328.) Of No. 8 he says: "There is a diagonal connection between the ore body in what is marked Utah Open Cut, which connects with the section east of the east Jordan end line, and then there is a further connection on stopable ore right to the end of the last section I have described.

Q.—All the ore you have spoken of so far, state whether or not it is within the lime belt?

A.—It is only in the lime belt; never out of it." (P. 328.)

Of No. 9 he says: "Continuing to the west there is a section of country that is almost wholly in ore passing through the stopes marked Emma and near the green level that from there to the north—but I will say that owing to the erosion of the hanging wall and porphyry intrusion, I

cannot say that the ore reaches the upper quartzite; it reaches porphyry which forms the hanging wall of the ore body." (P. 328.)

Of No. 10 he says (referring to Exhibit "T"): "At the surface across the entire belt of limestone through cut B and cut A there was ore connection with cut C in which is shown a body of lime, and from there you go from the foot to the hanging.

Q.—This ore in cut C reaches the hanging?

A.—Reaches the hanging.

Q.—And with the exception of a little break between it and cut B you have continuous ore in there at the surface?

A.—Yes, sir."

The witness adds that this is all marketable ore. (P. 329.)

And on pages 329-330 the witness describes tracing No. 11, which is a longitudinal tracing, and states that with very slight interruptions from station 214, which is at the head of the Holden raise, proceeding easterly and taking sometimes one level and sometimes another, they can follow in continuous ore easterly for about 3,600 feet, where they come to 350 or 400 feet of undeveloped country, and, passing over that and taking up the works to the east thereof, they can follow on ore easterly for 2,500 feet more without interruption. Then referring to Exhibit "S," the witness at pages 330-335 gives a detailed tracing in good ore continuously from a point under post 2, the northeast corner of the Jordan Lot 64, westerly to the top of the Holden raise, where the ore connects on the stopes with

the so-called Sampson fissure, most of the distance being, as shown by the witness, through large bodies of stopable ore, or through large old stopes, showing a thickness of ore of from thirty to eighty-five feet.

The next place spoken of by the witness where the ore occupied the entire space between the quartzite walls of this lode, is west of anything shown on the 80-foot map, and west of the great throw to the north of the country immediately west of the Ashland tunnel, and in the Stewart No. 1 Mine. Speaking of this at pp. 340-341, he states that in the Stewart No. 1 the ore extends or did extend from the quartzite foot to the quartzite hanging wall, and that he knows this from personal observation; and further testifies that if this portion of the lode lying to the west of the fault was brought back to its original position, this last ore tracing from wall to wall would be very little over 200 feet west of the Ashland tunnel.

There is another tracing in ore from near the hanging wall clear across to the footwall which was not mentioned by the witnesses, but which is demonstrated by the uncontradicted evidence in the case, which is as follows: Starting at station 100, or air shaft on petitioners' Exhibit 21, we are within forty feet of the hanging quartzite, as will appear by reference to respondent's surface map, Exhibit "T." The top of the air shaft on petitioners' map, is the same as the point marked "Tom Cat Raise," on Exhibit "T."

Now, we can go down that air shaft in ore to station 106 (petitioners' map, Exhibit 21), along incline drift to 108 through raise to 109, along drift through raise from

109 to 110, down work marked raise and old stope to copper level between stations 201 and 202, easterly along the copper level to station 200, thence easterly to station 306, thence we go to the work marked "drift on Sampson fissure," thence to the stopes marked lower stope and upper stope, and then taking respondent's Exhibit "S," where the Holden raise connects with the "upper stope," we go down the Holden raise to No. 1 level of the Jordan and to Emma west drift at station ——, where we have ore on the footwall connecting with the large Coolidge ore body. We have followed in good ore all the way, except as to a space of less than thirty feet between the said station 200 and 206 above referred to. This last tracing we will designate No. 12.

Mr. Mayberry, at pp. 371-4, traces the ore continuously lengthwise the lode from the top of the Holden raise out to the east end line of the Jordan, and states that he has followed it in stoping ore all the way, and at p. 374, *et seq.*, he takes up the tracing at the east end line of the Jordan and follows it easterly as follows (omitting questions): "You can come up through the drift from there to station 439 out through the tracing stope to the green level to its connection with the Utah tunnel, then you follow Utah tunnel, which has quartz, not ore there, not pay ore, but the quartz is continuous till you come out at this point, 590, and immediately above this there is a large open cut to the surface, from which ore was mined above this level, and then we come back on this, which is called the branch of the drain tunnel on the same level; in the drain tunnel we take up ore at 333, and drop down to what is called the

Davidson tunnel, in ore, and follow it easterly in the Davidson tunnel to 414 in ore, that there is a break or a piece of undeveloped country about 100 to 150 feet easterly and westerly on the lode, then you come into some workings in which is found the Storey tunnel, there is ore all the way through this lower work, they are mining it now; coming out to where we have elevation number 724.7, and there appears to be another break in the underground workings, but there are surface cuts between the points from which ore has been extracted; coming into the red level marked '1889,' we follow quartz and iron to station 247; we had lead ore there and followed that out to the south and came up a raise to the level above, called the *drain* level, in which station 323 is found; you can follow over to station 803; you can follow ore in that drain level easterly to station 631, and then you go up a raise in the quartzite which you can follow out to the mouth of the tunnel; just easterly of what is marked east drift near station 245 there is a cut in ore at the surface.

Q.—Then going east there is a jump apparently in which there was no development work?

A.—Out to the south there is a section of country there in which there is ore; it is in bunches laying all along in this side there.

Q.—We have a space here apparently of several hundred feet without any development work; is it true there is no development work in that space?

A.—There is some on the surface, expect it will be shown on our surface map, but it is not in our territory; in that surface work there was lime with streaks of red

oxide of iron in it; no underground workings that I have ever been in.

Q.—Now, coming to where you take up the workings to the east and thence on to the end of the workings as shown upon this map (being Exhibit 'BB,' 80-foot map), state how continuously you are in ore?

A.—There is a continuous ore body going out to the extreme west workings of the Telegraph."

And the witness adds, at p. 376, that the ore bodies and ore tracings to which he has testified are wholly within the lime belt. Proceeding, the witness testifies to a number of places where he can say of his own knowledge that the ore in this lode extends continuously from the foot to the hanging wall quartzite, and enumerates them as follows: One in the Carpenter Shop tunnel; one in the Grecian bend; one in the Spanish tunnel; one in the Cyanide stope; one in the Compromise stope, and one near the Lion's Den, and east of the Dolomite stope. (pp. 376-7.)

And Mr. Tyler testifies to continuous ore from the Holden raise easterly to the end line of the Old Jordan. (See pp. 432-3.) And at pp. 436-7 (taking up the most easterly workings shown on the 80-foot map, commencing with the Niagara and Old Telegraph), he testifies that he followed continuously in ore upon one level for a length of 2,500 feet, and he also testifies to a number of places where ore can be followed continuously from the foot to the hanging wall quartzite.

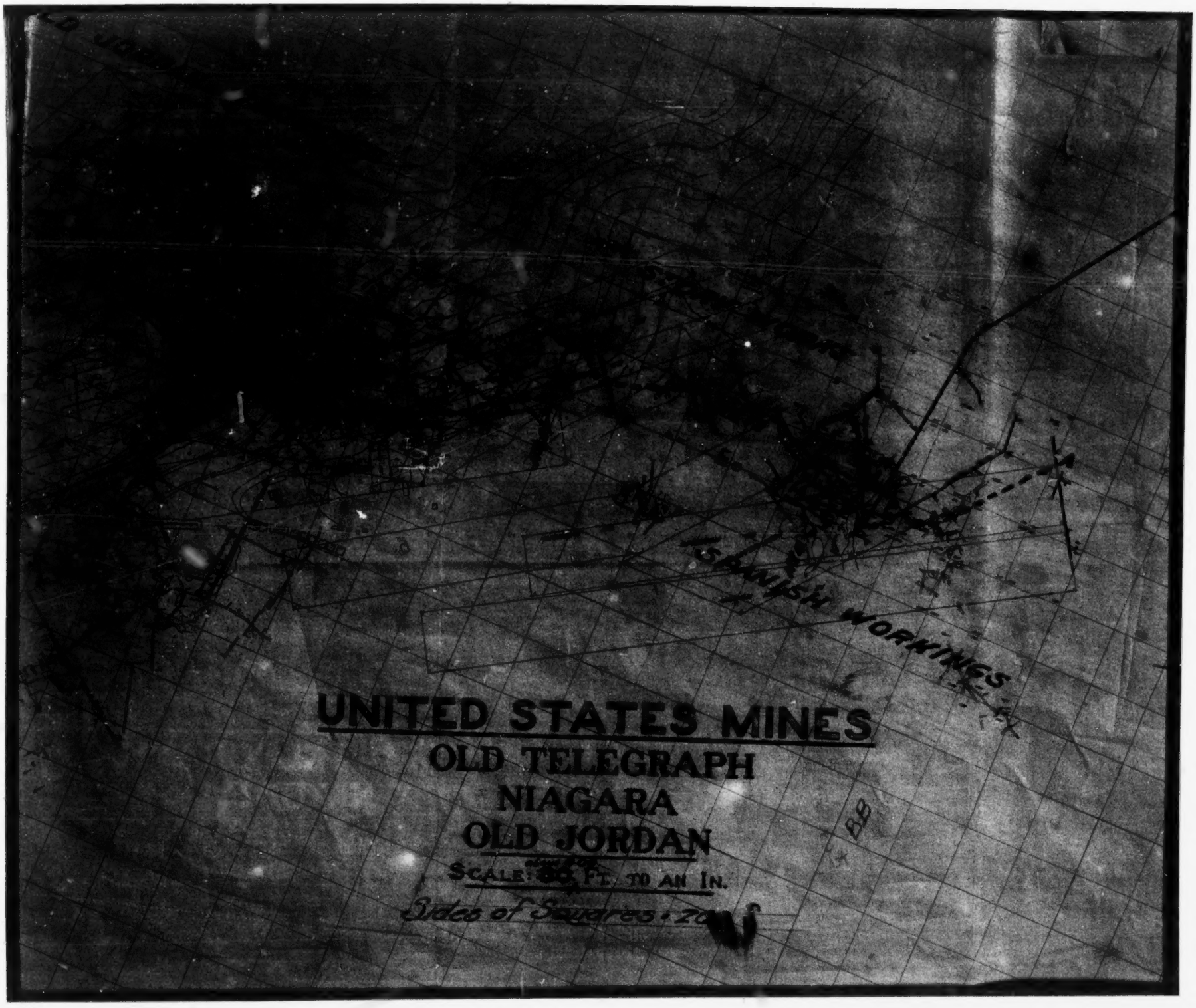
Mr. Palmer, at pp. 404-5, and also at pp. 410-11, testifies to the great extent lengthwise this lode that he has followed in continuous merchantable ore. And at p. 411 he

testifies to the ore tracing in the Stewart No. 1 from the foot to the hanging wall quartzite, and adds: "The lime (ore) in the Stewart No. 1 is conformable to the dip and strike of the lime beds, and in fact in places there are no lime beds left, the alteration has been so complete, but the structure of the original lime beds has been preserved just the same, so that you find in the ore bodies, and in the quartz, the structure of the original lime beds which the quartz took the place of." * * * And further states that it is mineralized from one boundary to the other, and that some of the largest ore bodies have been taken out of that portion of the Jordan lode thrown to the north.

The map on the opposite page is a reproduction on a reduced scale of respondent's "Exhibit BB," or 80-foot map, upon which are laid in broken red lines, all of the tracings, longitudinal, diagonal and cross, heretofore referred to.

It will be noted that each of the squares on the photograph measures 200 feet, so that it can be readily ascertained just what the distance is between any one and another of the cross tracings. Of course the tracing from wall to wall in Stewart No. 1 is not shown, since it lay west of anything shown upon the 80-foot map, but we have the evidence that it would be but about 200 feet west of the Ashland tunnel, as before shown, and No. 12 on the photograph, which is the tracing from the air shaft to the footwall in the Emma west drift, runs directly through part of the territory in controversy, and about 300 feet east of the last we have No. 9.

The testimony further is that one is liable to and may


SPANISH WORKINGS
UNITED STATES MINES
OLD TELEGRAPH
NIAGARA
OLD JORDAN
SCALE: 50 FT. TO AN IN.
Sides of Squares = 20
BB

BANISH WORKINGS
MINES
PH
TELEGRAPH WORKINGS

reasonably expect to encounter ore anywhere within the limits of this lime belt, and that the only intelligent and minerlike manner of prospecting and developing the lode, is to cut it from quartzite to quartzite. We can readily believe that this is true from the testimony as to what has occurred in the past history of the Jordan mine itself, as testified to by Mr. Holden. At pages 349-50 he tells us how one of the richest ore bodies ever found in Bingham was discovered. It lay between the right and left branches of the Mill tunnel. The right branch was driven within two feet of the ore body without disclosing anything to indicate that they were in the presence of a great ore deposit, while the left branch on one side of the bottom of the drift had actually touched ore, but the miners in laying track had laid the ties upon a little corner of the ore body, and it was not discovered until twenty years thereafter, and when it was found it extended both above and below the levels or branches of the Mill tunnel, and from it was taken $2,000,000. Another instance given by the witness was that of the Lion's Den, of which he says: "When we found it it was not connected with anything; afterwards in working around we connected with it right round in other directions." And (referring to "Coolidge Stope"), the witness testifies at page 350, as follows:

Q.—Explain how the Coolidge stope was discovered?

A.—We drove the No. 1 West Drift, colored yellow on this Exhibit "KK," from the lowest edge on the map to a point marked station 509, or about that point, and then it went out into the barren limestone apparently.

Q.—How far?

A.—On the vein lime; it was driven out there for five or six hundred feet with no merchantable ore showing in it, and we afterwards found that the Coolidge Stope, which we worked by crosscuts, was within three or four feet of the level, but was not showing in the level and no appearance of it in the level at all.

Q.—Was it above the level?

A.—Lying to the right of the level and passing under it.

Q.—You were that close to it?

A.—We were that near to it.

And at page 333 the witness describes with some detail the Coolidge Stope, and says: That this ore body had already been developed to the extent of 300 feet in length by 100 feet in width.

(This is the same work referred to in the brief for petitioners as the United States Tunnel No. 1, West Drift, and of which at pp. 150-1-157, it is said that the entire drift or tunnel, is in barren limestone, except where it encounters ore, on petitioners' Exhibit 21, at station 637, and again, where it encounters ore at the westerly portion of the tunnel, which ore, it is claimed, in the brief, is shown to be upon the Ashland fissure. And yet we find that lying to the right of, and passing under, that level and within a few feet of the same, is found the immense ore body known as the "Coolidge Stope." There was no attempt made to controvert the testimony with respect to this stope and its relation to the No. 1 Level.) And further, the witness testifies that the great ore body in the Black stope in the Telegraph, where they had

driven by it and afterwards found that they were within a few feet of it, was finally disclosed by a cave. (p. 350.) And at page 350 the witness explains their system of development to be as follows: The working map being kept up closely with developments, they examine it, and whenever they find that it shows a section in which there is no known ore body, they search round it within the lode lime for one of the small seams of which there are many containing vein matter, and drive into what has the appearance of being a barren region and open it up, and if they fail to find such a seam they drive right through the unexplored lime, looking anywhere in the lime between these quartzite walls for ore bodies; and that they have in several instances driven into a section of lime without even a seam to guide them and run into an ore body and he points out one of the places where such was the result.

Mr. Palmer also testifies that one may reasonably expect to encounter ore within the limits of this lode, and that the only proper method of prospecting the same, is to drive and cross-cut it in every direction to the quartzite limits, just as a miner would prospect a great fissure vein, never ceasing his development work until he reached the walls of his fissure. (Cross-examination of Mr. Palmer, pp. 419-420.)

Next, as to the ore bodies encountered in the Kempton workings. Mr. Palmer, Mr. Holden and Mr. Tyler all testify that these ore bodies are bedded. Mr. Tyler drew a sketch illustrating the ore body 180 feet long in the west drift, showing a comparatively narrow fissure standing at

an angle of about 70 degrees, cutting the ore body and passing through it from south to north and the ore body itself having a strike with the beds and dipping at an angle of about 40 degrees. (P. 436.) He also says that the westerly 100 feet of the turnsheet level lies parallel to the lime beds, and is dipping with them; that it is followed from one level to the other with the incline so that one could go continuously down; that the incline goes down in ore dipping with the bedding. See p. 438. And Mr. Palmer, at pp. 409-410, speaking of the west drift, which on our Exhibit "R" runs from station 961 westerly, says that the ore body conforms to the strike and dip of the lime beds throughout; that the same is true of the intermediate level colored yellow, which is an unbroken ore body from end to end; that all the ores found in the red level are conformable to the dip and strike of the beds of the limestone.

See also the testimony of Mr. Holden upon the same subject, pp. 369-370, where he also says these ore bodies are conformable to the beds of the country. He also says there are vertical breaks through the ore bodies in the west drift in several places; some of them are short breaks; that in one place you can follow a break to a point where you can see it fading out; that these vertical breaks are quite common throughout the mines.

And Mr. Tyler, at p. 438: "As to the apparent vertical fissures in some of the ore bodies, as long as we suppose that the vertical fissures, coming out of the quartzite, are later, we could or should expect to find vertical seams running through the ore bodies in sympathy with the gen-

eral cracking of the country by the cross fissures. There might never be found any single narrow belt following the line of the fissures as they got into the lime and into the ore, but we would expect to find a zone of sympathetic fissuring and cracking."

It will be remembered that petitioners' witnesses contend that the ore bodies in the vicinity of these fissures are laminated with the dip and strike of the fissures, and this constitutes the only evidence to which they refer to establish their claim that the fissures antedate the mineralization of the limestone belt, and were the cause of such mineralization.

On the other hand, it is practically admitted by Mr. Morehouse, petitioners' principal witness, that had these fissures cut through the pre-existing ore bodies substantially the same condition would exist, thus agreeing with Prof. Tyler.

As the quartzite is a tough rock we should expect to find, as we do, a clean, single crack or fissure. The limestone, however, as the testimony shows, is a more friable rock. It had already in the process of mountain building been shattered and broken, and profoundly altered and metamorphosed, the ascending solutions had already mineralized it from end to end, and vast ore bodies had already been formed. As the force which opened the Ashland fissure and other parallel fissures encountered this limestone belt it would be to a large extent dissipated and we would find through the pre-existing ore body, as Prof. Tyler well said at page 438, not "a single narrow

belt of fissuring," but "a zone of sympathetic fissuring and cracking."

That there are great ore bodies running lengthwise the limestone lode, to the extent testified to by witnesses for respondent, and also others running cross-wise the lode from quartzite to quartzite, and still others, running diagonally through the lode from the foot-wall to the hanging wall quartzite, as testified to by these same witnesses, is not disputed.

These facts are tacitly admitted by petitioners, there was no attempt made to question them.

Coming now to the surface and using respondent's surface map, Exhibit "T," we turn to the evidence of Mr. Tyler, pp. 429-31, and find that in addition to the surface tracing made by petitioners, of the so-called Kempton bedded vein, which we have heretofore commented on, we have ore at surface; at station 340 a shaft near the northeast corner of the Mountain Gem, and at station 342, that in that tunnel running to the shaft, the same ore streak is shown, near the mouth and south of the south line of the Kempton Claim, and that to the south of this and at place marked "Corner Incline" on the map, there is an incline about 60 feet deep following the bedding of the lime, and showing in the bottom about 12 inches of first class sulphide ore. Again, over the Rip Van Winkle tunnel at surface, there is ore, and the appearances are that a good deal of ore has been quarried out there; the ore in the incline itself is 15 to 20 feet thick, which is also bedded down to the bottom; and in the Mountain Gem Incline, at station S 22, while the ore is

comparatively unimportant at that point, there is a bedded vein there. There are strong fissures in the limestone with oxidized ore, which is characteristic of the other openings. At the head of the Jackson Incline, the joints on the limestone, on the side of the cuts, are filled with the same red oxide ore material, while the incline itself is run upon a fissure in the limestone, and there has been ore stoped above and below and running out from it; the incline follows down the bedding of the limestone and the ore in the fissures seems to be in bodies having their dip with the limestone and not vertical as in the ordinary fissure structure. At S 7 is a surface opening with ore the width of the incline. At S 310, S 308, S 307, at the southerly edge of the lime belt, there is ore at the surface, and then the cuts A, B, C and D, show ore at surface, which continues across the lime belt from foot to hanging wall.

See also Mr. Holden, pp. 347-9, and Mr. Mayberry, pp. 338-9.

In brief for petitioners, pp. 154-5, it is said that the Neptune tunnel, from where it encounters the contact of the quartzite with the limestone, extends through the barren limestone 300 feet, where it intersects the ore channel near the Sampson fissure in Kempton ground, and counsel say: "Here again we have 400 feet of limestone penetrated by this tunnel without an ore occurrence, or the occurrence of anything but barren limestone and the barrenness of the limestone is proved by the assay of it taken by the witnesses Morehouse and Beveridge."

Now, Mr. Holden, speaking of this same tunnel, says,

341, *et seq.*, that the tunnel starts in quartzite and continues therein about 180 feet to the contact between the quarzite and limestone; that right on the line of contact, there is ore about four feet in width; that he had samples taken from it for assay; that where this ore is encountered there is a drift running east about 20 feet and a raise on the contact to the south from station 418c, which runs up 25 or 30 feet in merchantable ore; that along the line of this tunnel between this ore found upon the contact, and the ore encountered in the tunnel at the Sampson fissure, there are 16 seams of ore and vein matter, crossing the tunnel. The place in the tunnel where each of these seams is encountered is given by the witness definitely and from each of them he had a sample taken for assay. Samples were numbered from 1 to 17 inclusive, and the certificate of assay thereof will be found in the record, p. 381; reference thereto will show that, with few exceptions, the ore encountered in these seams was, in value, merchantable.

And Mr. Tyler, at page 436, says: "I would say with regard to the Neptune Kempton lower tunnel, that from station 418c northerly, the limestone shows many other fissures dipping at various angles and having various strikes. So, while there is 17 of them, I think I counted in the distance to the Sampson fissure, the Sampson being No. 17, some of those were of a size that would justify development at the present time. Some showing two or three feet of good ore and some smaller ones, but it has been the habit apparently in the mine to develop those smaller seams, frequently with a view, or

with the expectation of their leading to larger ore bodies. I saw several instances in going through the mine, where that course had been followed; a little fissure has been found to lead to a larger ore body or to a good ore body. Now, having these different courses and dips, development on such a system of fissures as that, would tend to tie the whole belt of lime together, making a net-work of fissures extending from wall to wall through it if they were followed up."

See also testimony of Mr. Mayberry, pp. 379-380, and Mr. Charles Brink, pp. 399-400.

At pp. 155-6 of brief for petitioners, it is claimed that all that portion of the Kempton Claim east of the Sampson fissure is barren limestone, and that such is the condition disclosed *by the surface*, and by the workings running through it.

This statement is somewhat remarkable in view of the fact that the petitioners' witnesses testified to an ore tracing at the surface on the so-called Kempton bedded vein, within a few feet of the northeast corner, or Post 1 of the Mountain Gem Claim, shown upon petitioners' Ex. 21, which is more than 250 feet easterly of where the Sampson fissure is shown at the surface on the same exhibit; and also in view of the fact that on this exhibit, stopes are shown as far to the east as the Kempton incline, marked thereon. The statement is perhaps even more remarkable in view of the undisputed fact that starting in ore on the Sampson fissure and going thence easterly, there is a large unbroken continuous ore body more than a half mile in length.

At page 117 of petitioners' brief it is complained that:

"Respondent's Exhibit 'T' and other maps which have colored upon them the ore bodies and the lime belt, omit several claims in conflict with the claims of respondent, and which are laid cross-wise thereof and upon fissures unmistakable and with strongly defined ore veins which have been mined extensively for years cross-wise the lime belt. The result is that the bodies of ore contained in these fissures and unmistakably so, and upon veins which have been mined for from a few hundred to several thousand feet, are made to appear to have their ore bodies scattered indiscriminately through the alleged lime lode. Had these claims been placed upon the map with their boundaries, their relations and the veins included within them and therein so extensively mined, their true nature would at once have appeared, with the effect that it would have shattered the apparent showing of occurrences of ore along the course of the lime belt.

There is nothing in the record to show that there is any claim laid cross-wise of the lime belt, which conflicts with the claims of respondent.—That is to say, there is nothing to show that there is any claim which does not belong to respondent, which is laid cross-wise of the lode. There is nothing in the record to show that any of the north and south fissures have been mined extensively for years, or that much or any mining has been done on any of them except the Ashland and Galena fissures. We are wholly unable to understand how the omission from the maps, of claims which were laid cross-wise of the lode,

could obscure in any way the nature of ore occurrences in the lime belt. Or how any light could have been thrown upon the ore occurrences by placing upon the map, claims which were laid cross-wise of the lode. In any event, respondent is not responsible for the omission on the part of petitioners, to place upon their maps any and all mining claims which may have been laid in a northerly and southerly direction.

The fact is as shown by the record that none of these north and south fissures, easterly of the so-called Kempton incline fissure, was alluded to by any witness on behalf of petitioners. But the existence of all such and the locality thereof was testified to by Mr. Holden in direct examination.

The witness, having testified at page 324 that this lime belt which was originally horizonal, had in the process of mountain building, been tilted up, and in tilting had been crushed, broken and shattered within itself, and left a mass of entwining and interlacing fissures running across the lime, running with the lime, and running in other directions, there are many thousands of them, and that these fissures are wholly within the limestone—they never extend into the overlying or underlying quartzite, testifies at page 335, *et seq.*, as follows:

Q.—Now, I will ask you if you are familiar with another system of fissures other than those you have spoken of, which are confined to the limestone, which cross the country in a general northerly and southerly direction?

A.—There is a system of fissures which we know

run out northerly and southerly; they are substantially parallel and were formed after the great—

Q.—Name them commencing at the westerly end?

A.—Commencing at the westerly end of the limits of the 80-foot map shown here, is the Ashland, the Galena and the Live Pine, Condor, Bully Boy, Silver Shield and Giant Chief.

Q.—Could you indicate those on the 80-foot map in their order?

A.—The Ashland fissure is about through the region that I hold my pointer; that is, through the square marked 180, * * * and passes 231 square to the north in black. * * * Then we have the Galena fissure, running on this long line of work shown. Between the Ashland and the Sampson fissure, there is no fissure that I know of that extends into the quartzite; there is none, I think. The Sampson fissure is confined wholly within the lime and does not extend into either the foot or hanging quartzite. I carefully examined them to determine that. I examined every feature around there and looked very carefully; and there are many evidences that that does not extend either into the hanging or foot wall quartzite. * * * The next north and south fissure which passes through the country generally is the Galena; the next is the Live Pine, which passes north and south, faulting the bed. The next the Condor, indicated by a line at this point on the tunnel but not lettered. It would pass through a point in the working marked "Tracing stope," and near elevation 878. The next to the east is the Silver Shield. The next is the Giant Chief. That

would be along through nearly on the line of the level running north and south from the Roman Empire tunnel, colored yellow. As you go east from that there have been no known fissures, ever detected in either the hanging or foot. (See also testimony of Mr. Palmer, p. 404, and Mr. Tyler, p. ——.)

It was Mr. Holden also who testified to the work that had been done on the Galena fissure, and it appears that it was done by him or under his direction. (Record, p. 354-5.) The testimony of Mr. Holden and other witnesses of respondent as to these north and south fissures, is not controverted by any one, nor was there any attempt to show that there were any others than those named and located by respondent's witnesses.

So it appears that so far from respondent having attempted to conceal the fact of the existence of these north and south fissures by omitting to place upon its maps, mining claims which were laid cross-wise of the lode the fact is that the existence of all such fissures was revealed by the testimony introduced on behalf of respondent. The complaint made in petitioners' brief to which we have referred, is without justification.

(b) *But this broad lode was formed, mineralized, prior to the opening of the Ashland and the other north and south fissures—it does not owe its mineralization to such fissures.*

The petitioners claim that the north and south fissures supplied the sources of mineralization of the great east and west lode, as we find it today. Even if their claim were well founded, we do not see how

it could materially affect the question as to whether or not the lime belt is now to be regarded as a lode. Having all the features of a lode, within the meaning of that term, as used in the Act of Congress, it would seem to be immaterial from what source its mineralization was supplied. But we insist that petitioners' claim in this respect is refuted by physical facts which are not disputed and which cannot be successfully gainsaid. There are certain features of the lode, and the neighboring country today visible on and beneath the surface, which lead necessarily to the conclusion that these fissures were not opened until after the great bedded vein had been formed. We will take them up in their order.

First: We claim that just west of the Ashland tunnel, where is found the great porphyry eruption, a great fault or throw has taken place, which carried the westerly portion of the Jordan Lime belt to the north a distance of about 800 feet, and that this throw took place subsequently to the mineralization of the lode. What are the evidences of it? To the east of the Ashland tunnel we have three distinct parallel belts of limestone coursing easterly and westerly and dipping northerly with alternating belts of quartzite. Just west of the tunnel we encounter the porphyry, against which the lime and quartzite belts terminate abruptly, as we follow them from the east, and they are no longer found in the direct line of their course as we have followed them from the east to this point, neither are they found anywhere to the south; but going north about 800 feet, we take up three belts of lime with their intervening quartzite which terminate

abruptly against the porphyry in their course eastward; they occupy the same relative position, one to the other, that those had which we lost on the east of the presumed line of fault; they are enclosed by like quartzite belts, they correspond in width, strike and dip, and in all other respects with those on the opposite side of the throw, and to the south. The one to the west of the throw, which correllates with the Jordan lime, is found to be ore bearing and mineralized in precisely the same manner that we have found the Jordan lime to have been. See testimony of Mr. Palmer at pp. 402-3; of Mr. Holden, at pp. 337-8, and of Mr. Tyler, at p. 437.

There would seem to be, therefore, no room for reasonable doubt, that there was such a throw of the western country to the north, and that such throw took place after the great bed vein or lode had been formed, and its mineralization completed. If we had a fissure vein, great or small, and we should find that it terminated against a line or plane of fault, and that it was mineralized generally throughout its extent to the point where it was so cut off, and then by search and development along the plane of fault, we should find and take up at any given distance from the point where the fissure was terminated, a fissure terminating abruptly against the opposite side of the fault, and should find that it corresponds in all essential features with the one which we had lost; that it is mineralized in the same manner, the only rational conclusion, it seems to us, which could be drawn from such a state of facts, would be that these now disconnected fissures were once connected, forming one continuous fissure,

and that it had been dislocated subsequently to its mineralization. No geologist and no miner of experience, would entertain any doubt about it, and there is of course no reason why the same conclusion should not be adopted in the case of a bed vein, contact vein or any other form of vein found under like conditions.

Second: We say that the north and south fissures were opened later than the porphyry, which probably caused the dislocation of the vein. Why? Because it, the porphyry, is itself cut by these fissures. See Palmer, p. 404; Holden, p. 346, and Col. Wall himself says at p. 289, speaking of some of the workings in the west drift in the Turnsheet level, where he finds a tongue or sheet of porphyry: "Which (porphyry) again is crossed and intersected by the Ashland fissure and the other fissures. And again, speaking of the porphyry in the Turnsheet level, at p. 302, he says: "I believe near the face there is a short fault near the face." And see p. 291.

Third: We say the north and south fissures have been found in some instances to actually fault the bedded ore bodies. Tyler, pp. 434-5; Holden, pp. 338-339.

And one of these fissures, which we find faulting the bedded ore, is the Ashland itself:

"Q.—What about the Ashland fissure, do you find any displacement of the ore bodies connected here?

A.—I think the Ashland will show a displacement of eight or ten feet, as I would say.

Q.—At what points?

A.—In the neighborhood of station 971.

Q.—I will ask you whether you find ore in that neighborhood?

A.—There is ore in a bedded vein breaking out from the main fissure, and there appears to be a displacement as I say, of eight or nine feet in the bedded vein, one side being back of the other, that is, the west side lying further south than the east; a continuation of the same.

Q.—Does that show a displacement of the ore itself?

A.—That shows a displacement of the ore vein."

Tyler, pp. above referred to; Holden, pp. 338-9.

And Mr. Palmer, at pp. 405-6, testifies that along the line of some of these faults there is a "dragging" of ore which would show conclusively that the ore had been deposited prior to the fault.

There was no attempt on the part of the petitioners to contradict or dispute this fact of such faulting, or to explain it away in any manner whatever.

Fourth: We say there is no evidence of any local enrichment of the lime belt or lode in the vicinity of where it has probably been intersected by these north and south fissures, or any of them. (See Tyler, p. 456; Palmer, p. 433; Holden, p. 388.)

Fifth: We say that the great length of continuous and merchantable ore lengthwise this lode, where no transverse fissure is found, indicates most clearly that the mineralization of this bed vein was independent of, not due to, the north and south fissures. For instance, from the Ashland fissure to the Galena fissure, a distance of about 900 feet, as will appear from the maps, we have the great ore bodies shown on Exhibit "KK," and that be-

tween these two fissures there is no intermediate north and south fissure which extends beyond the lime belt into either the overlying or underlying quartzite.

Again, easterly of the most easterly north and south fissure found in the ground, the lode has been developed for a distance of 2,200 feet, and here as rich and as large ore bodies as are found in any other section of the lode are found, and indeed, the whole 2,200 feet is in continuous and merchantable ore.

See Tyler, pp. 435-437; Holden, 338; Palmer, 404-5, and also Mr. James W. Neill, a witness in sur-rebuttal for petitioners, pp. 520-1.

And Mr. Neill, a witness for petitioners in sur-rebuttal, at page 520, says that he has examined this limestone belt as far east as the Dalton & Lark and the Brooklyn, which are way to the east of the Old Telegraph and beyond anything shown on Exhibit BB.

And on direct examination, at page 511, he says that the Old Telegraph Mine is in the bedded vein, in what has always been spoken of as the Old Telegraph and Jordan bedded vein.

It appears that this witness from 1900 to May, 1901, was manager of respondent's mines. He then evidently was of opinion, as we are now, that the so-called Jordan Lime belt was to be regarded and treated as one indivisible lode and vein. See reports made by him as manager, one at pages 519 to 520 and the other, pages 515-516.

It appears, too, from the testimony of petitioner E. A. Wall, that he has followed the business of mining for thirty years; that for ten years he has been acquainted

SECTION No. 1

Scale, 80 feet to 1 inch

J. Ferrison Smith, M.E.

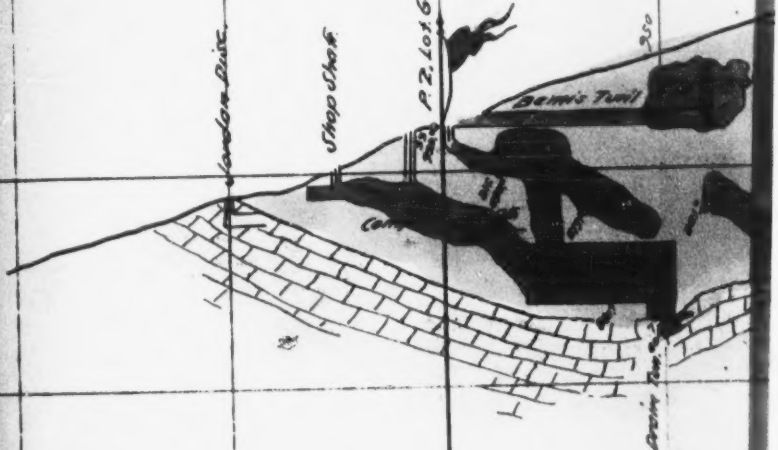
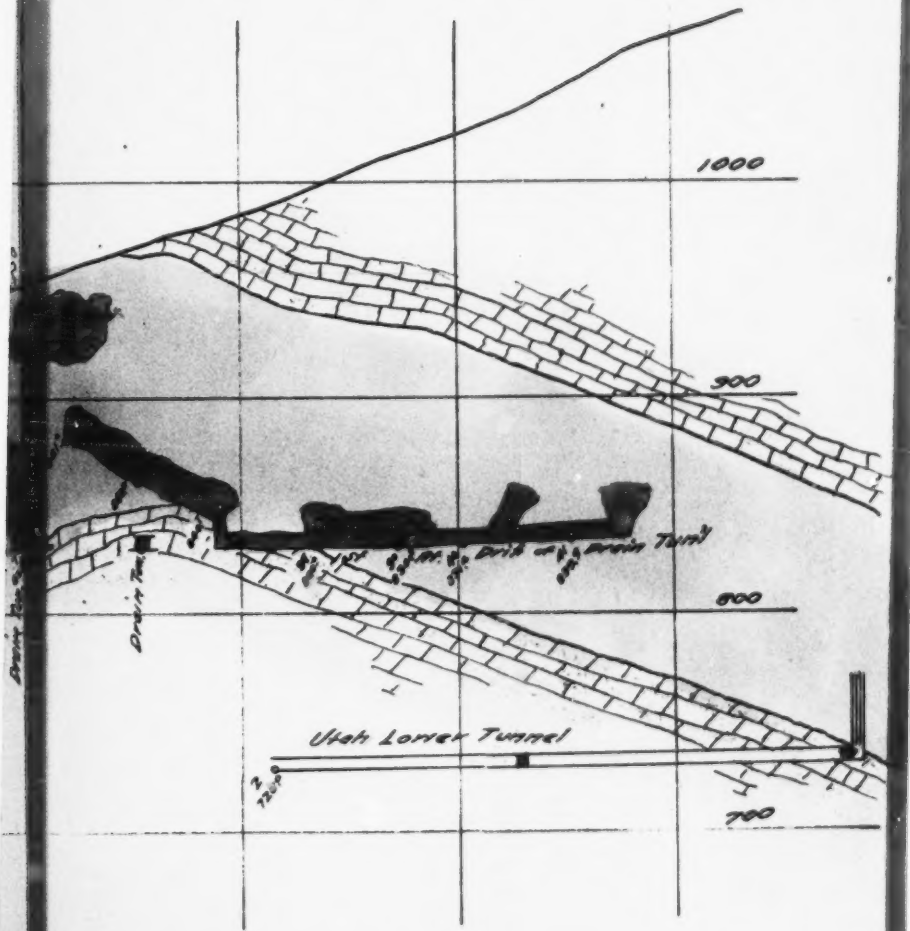


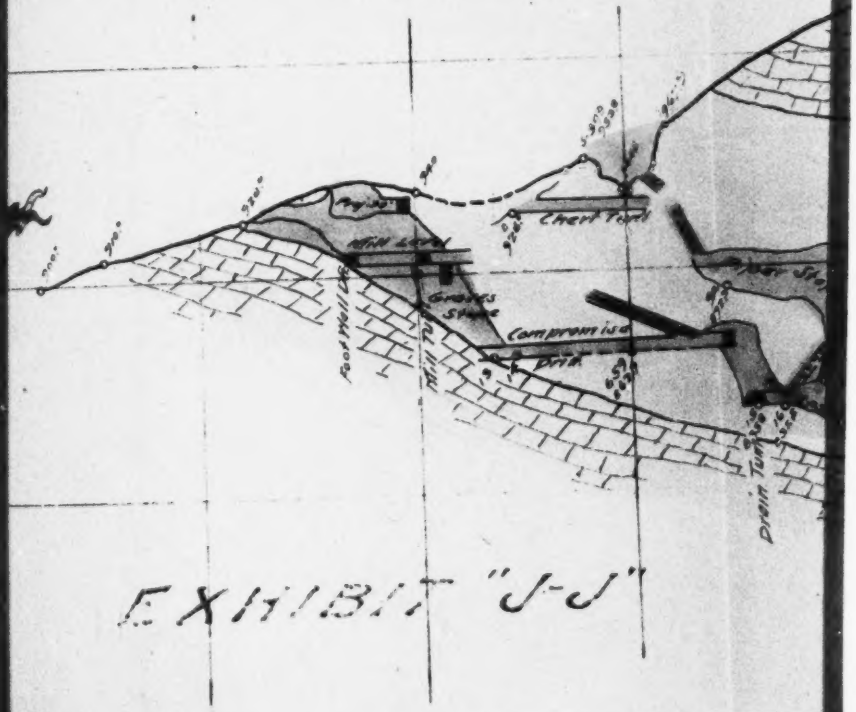
EXHIBIT "J-J"


1000
900
800
700
Utah Lower Tunnel

SECTION No. 2,

Scale, 80 feet to 1 inch.

J. Ferrson Smith, M.E.



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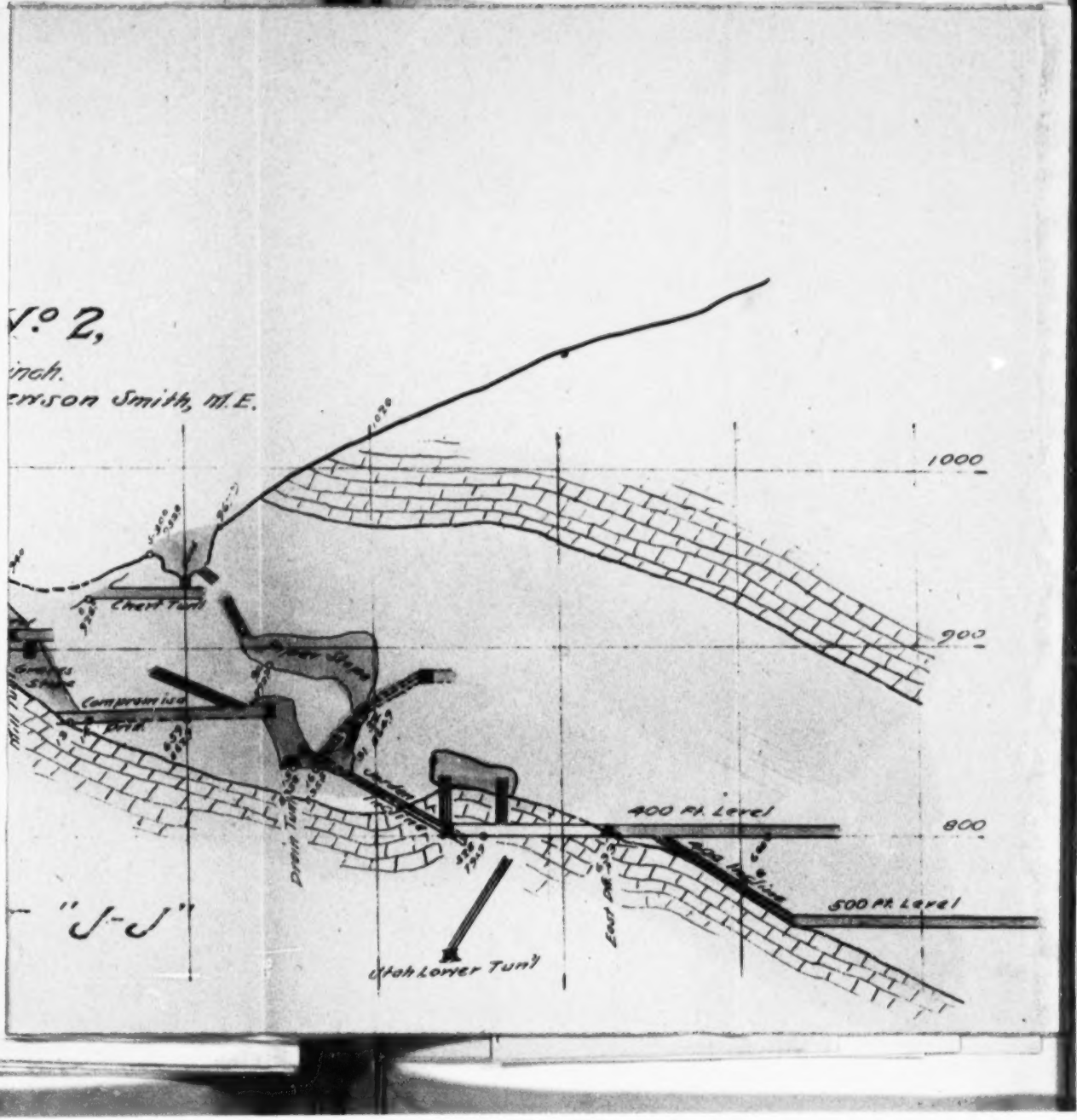

V.° 2,
inch.
erson Smith, M.E.
1000
900
800
Chert Tunl
Compromise
Drain Tunl
400 Ft. Level
500 Ft. Level
High Lower Tunl
"J-J"

SECTION No. 3,

Scale, 80 feet to 1 inch.

J. Fenson Smith, M. E.

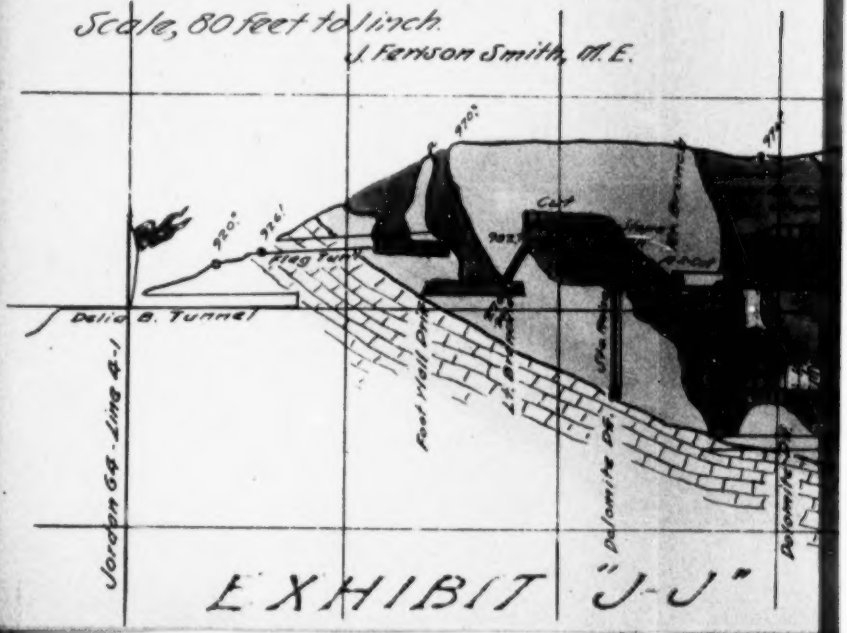
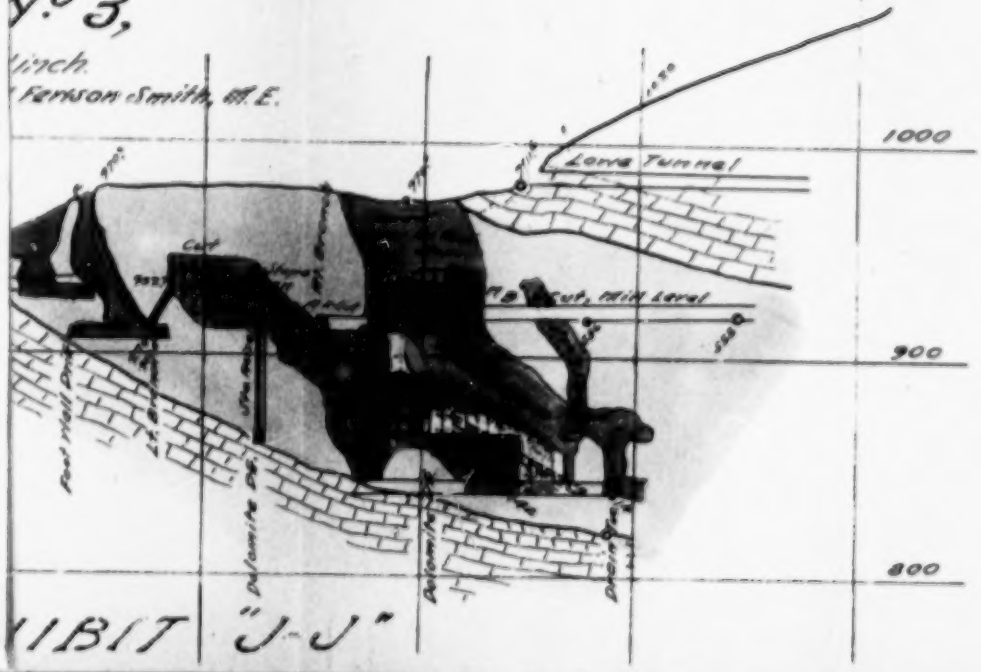


EXHIBIT "J-J"

y.° 3,

linch.

Ferrison Smith, M.E.



IBIT "J-J"

SECTION No. 4,

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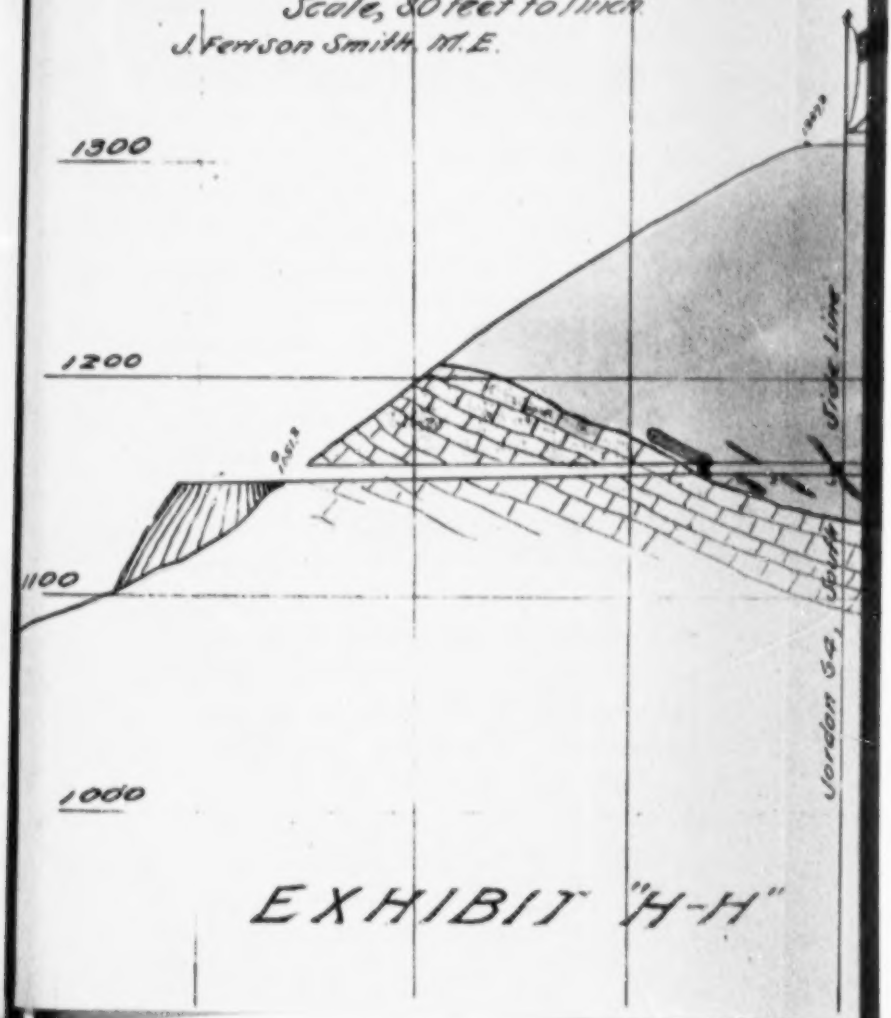
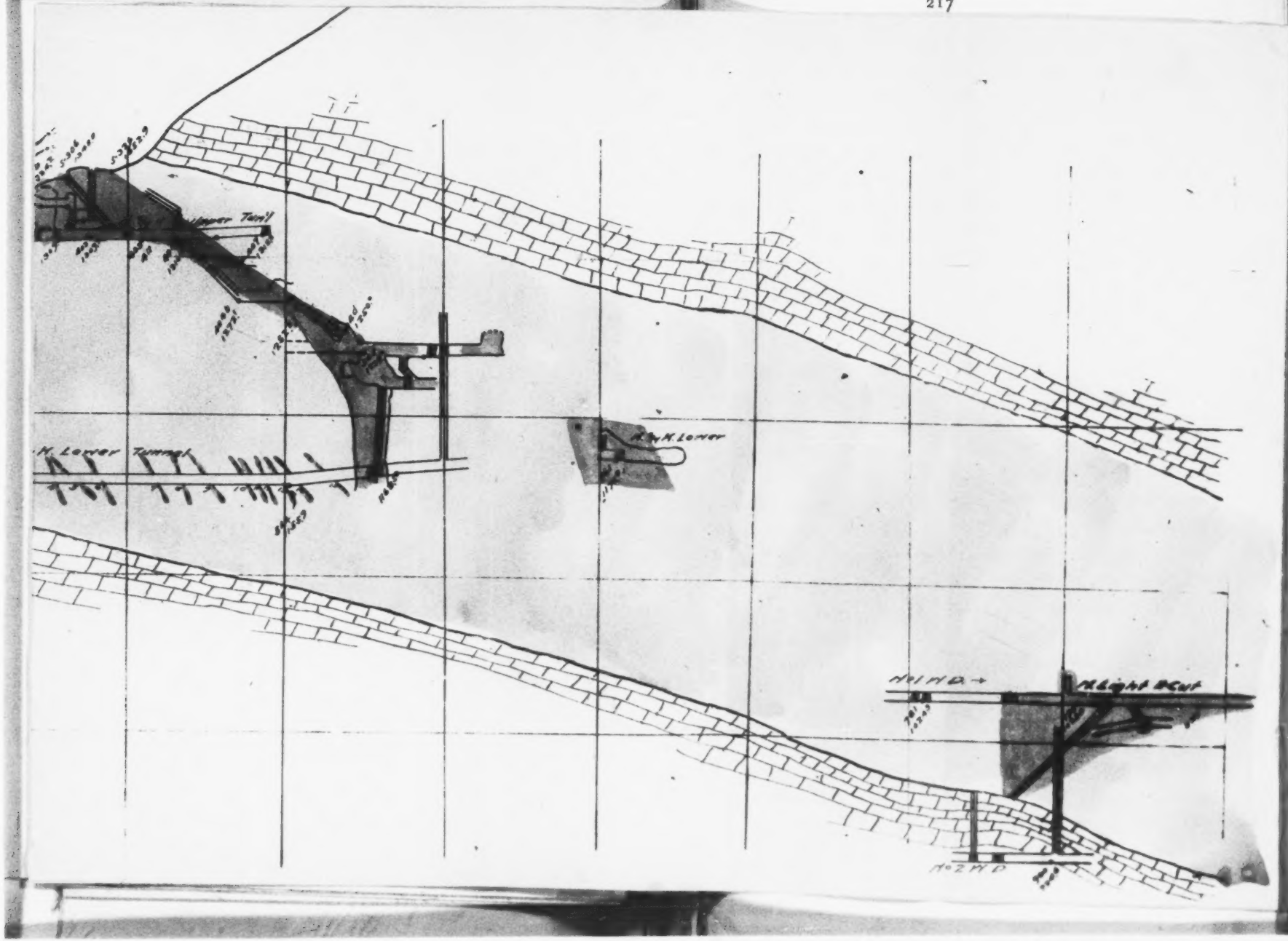


EXHIBIT "H-H"


Lower Tunnel
N. Lower Tunnel
No 1 H.D.
No 2 H.D.

with the district in which these mines are situated, and that during the year last past, he has actually been engaged in working and operating the particular section of the country in controversy. And we learn from his testimony and his amended answer that until a few weeks before the trial was entered upon, he believed that there was but one vein in this territory, namely, the bedded vein, which was conformable in its strike and dip to the limestone beds. (See record, pp. 287-291-295. And on re-direct, pp. 297-8.)

It was only on the eve of the trial that he changed his opinion in this ard and reached the conclusion that there was another separate and distinct vein from that of the Kempton bedded vein, to-wit: the Ashland fissure. A very radical change of opinion surely, and he tells us that he was led thereto by the discovery that the structure of the ore bodies found in what he claims is the Kempton bedded vein and those found in what he claims to belong to the Ashland and the other north and south fissure veins, differed; that in the bedded vein being conformable to the strike and dip of the lime beds, while the structure of the ores in the fissure vein conformed to the dip and strike of the fissures.

He undertakes, at pages 284-5, to state what this difference in structure is, and says: "The platings are the structural lines of the ores and thus related to them in the bed veins, *have a similar appearance to the fissure where the bodies are large and wide*, more so than where they are narrow, as they are in sor e instances, at a considerable distance from the fissures then the

structural lines are very distinct and parallel to the bedding of the limestone. In some instances the bedding planes are preserved through this ore body. * * * That is especially noticeable in one of the east drifts in the lower level from the Kempton tunnel; generally the lines which run parallel more or less with the ore are understood to be structural lines * * * which divide or separate the mass of the vein matter, where not affected by the fissure; whereas the ore in the fissure, or the ore related to the fissure have structural lines parallel both in dip and strike to that of the fissure."

If we understand the witness he means that in the large ore body the structural lines of the ore are similar, whether the ore be in a fissure or in a bed, that where the bed is comparatively small and lean the structural lines are conformable to the beds, and that where the fissure or fissure ore bodies are small, the structural lines are with the fissures. How then when we encounter a *large* ore body, are we to determine from its structure whether it is in a bed or a fissure vein? It must be according to this test impossible and this would explain why it never dawned upon Mr. Wall, when he ran through an ore body for a distance of 180 feet (as he tells us) easterly and westerly, with so-called structural lines nearly vertical, that he was not in a bed vein but a fissure vein.

Mr. Morehouse, speaking of these differences in structure, at pp. 176-7, tells us it is this, namely: That the ore in the fissure veins is cracked or laminated vertically, while that in the bed vein conforms to the beds, but Mr. Morehouse also states on cross-examination, at page 200,

that if there had been a pre-existing ore body, such as we have in the west drift, for instance, (defendant's map 21) and that the same lay with the beds and was subsequently cut through by a series of north and south cracks and breaks, it would give to such ore body a very similar appearance to that which it now has in the west drift.

The map opposite this page is a reproduction of plaintiff's Exhibit T, reduced, however, from a scale of 30 feet to a scale of 80 feet to the inch. The blue color shown on this map represents the lime belt, the yellow represents the quartzite, foot and hanging walls, the green at the westerly end represents the porphyry and the red the ore found in openings at the surface. (See testimony of Holden, record pp. 328-9, and that of Mr. Tyler, p. 431.)

Speaking of this porphyry near the westerly end of the lime belt, as shown upon Exhibit T, Mr. Holden, at page 340, says that its dimensions are very great; that it is a huge intrusion evidently, the porphyry being in places probably a mile in extent in a northerly and southerly direction. (See also testimony of Mr. Palmer, 404.)

Petitioners may say that our claim that, the order of events were, first, the mineralization of the bed vein; second, the great fault, and third, the opening of the north and south fissures, is a matter of expert evidence only. Granting it, we say in reply, that their contention that this great lime belt was wholly mineralized by these north and south fissures rests also upon the opinion of experts only. Our contention seems to be in harmony with all the known and observable facts, while their theory is at war with and

cannot be reconciled with the great body of the facts. A most remarkable theory, surely: We have this particular lime belt mined and developed almost continuously for a distance of three miles or more; so richly has it been endowed by nature that from it has been taken 80 per cent. of the entire mineral wealth that has come from the entire Bingham district in a period of forty years of work and development; it is cut by a system of north and south fissures in some instances 1,000 feet apart, without a particle of evidence that any ore or mineralization has been found in or near them, save where they are supposed to have intersected the lime belt, with the exception of two, namely: the Ashland and the Galena, and as to the Ashland, according to their own evidence, it is insignificant both as to its width and its mineralization, save where it traverses the limestone, and as to the Galena, there is no evidence that it carried any mineralization whatever in the quartzite or porphyry north of the lime belt, and yet we are asked to believe that to these fissures is to be referred all of the enormous wealth of the limestone lode and vein.

THE TESTIMONY OF RESPONDENT'S WITNESSES IS ENTITLED TO GREATER WEIGHT THAN PETITIONERS' WITNESSES BECAUSE THEIR EXAMINATION WAS MORE THOROUGH AND EXTENSIVE, AND KNOWLEDGE OF THE FACTS THEREFORE MORE COMPLETE.

In closing the discussion of the facts, we may be permitted to suggest that while we do not for a moment question the integrity or honesty of purpose of any witness who has been called on the other side, yet because of their

limited knowledge of the facts necessarily involved in a proper determination of this controversy, their evidence is not entitled to as much weight as it would have been had they made themselves more familiar with the subject. Some of them were upon the ground for a few days only; all of them confined their attention almost wholly to the limited area in which the Kempton workings are found; of the features disclosed in the great east and west lode they are, comparatively speaking, wholly ignorant; they have not even attempted what might be called an examination of it. On the other hand, Mr. Mayberry has been the foreman in charge of all the workings of the United States Mining Company for over two years, directing its workings from day to day, and examining the lode with a view to testifying in this cause. Mr. Holden has been in charge as manager for the plaintiff and its predecessors for eighteen years, with the exception of two years, when his place was filled by Mr. James Neill, and is familiar with almost every opening in the mines, and with every foot of development that has been made therein, and in addition to this he is familiar with most of the other great mines laid upon this lode. Mr. Palmer, a mining engineer of large experience, and who for more than thirty years past has been the mining engineer in charge of some of the greatest mines in the State, has also had occasion to familiarize himself with the features of this lode at intervals extending over a period of almost thirty years, in addition to his examination made in connection with this case. Mr. Tyler, also an engineer of eminence and large experience, has devoted months continuously to a detailed examination of

all the characteristics of this lode and the ore deposits therein, and of all other features which occurred to him as necessary in his examination with a view to determining what constitutted the lode and what its boundaries were.

The maps which ~~here~~ follow said Exhibit "T" are like productions of respondent's Exhibit "J" and its Exhibit "H." These show how the ore is found, sometimes on the foot, sometimes on the hanging wall, and sometimes replacing the limestone from one wall or boundary to the other.

We respectfully submit that this belt of limestone with its sharply defined boundaries, crushed, broken, altered and mineralized to the extent shown by the evidence, must in contemplation of law be regarded as a single lode or vein. There is no place within a distance of three-quarters of a mile, including the particular territory in controversy, where a plane could be passed northerly and southerly, which would not cut in twain one continuous ore body; neither could any plane be passed longitudinally through this belt of limestone which would not within a comparatively short distance cut through an ore body or ore bodies either at depth or on its course. The ores found in this lode are not capable of division or separation, so as to enable us to say that the part or portion lying to one side of any imaginary plane belong to or are included within a vein or lode which is separate and distinct from the ores lying on the opposite side of such plane. The case more than meets all the requirements of the definition of a lode within the meaning of the Act of Congress, as given by this court and several of the Circuits.

THE AUTHORITIES DEFINING THE MEANING OF THE TERM "LODE" EXAMINED AND APPLIED.

Referring to the Eureka case in the 4th of Sawyer, p. 302, the Court, speaking by Mr. Justice Field, said at p. 311:

> "It is difficult to give any definition of the terms(vein or lode) as understood and used in the act of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rock and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the act of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from neighboring rocks, it includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same form and appearing to have been created by the same processes." "Examining now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of

> several hundred feet in thickness; and on its north side for a like extent by a belt of clay or shale, ranging in thickness from less than an inch to seventy or eighty feet."

It further appears from the opinion that the included zone of limestone there in question, varied in width from a few feet at the east end of the zone to as much as 800 feet farther west; that the limestone had been "broken up, crushed, disintegrated and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification." Also, that in the lime were numerous caves, and that oxide of iron was found in numerous places throughout the zone, "giving to the miner assurance that the metal he seeks is in its vicinity." "This broken, crushed and fissured condition of the limestone, the presence of oxide of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner an individuality, a oneness as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone. Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock." Turning to page 309, we find how irregularly the ore was distributed in the lime zone, from the following language of the Court:

> "Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone in which,

> at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains."

Reference to the diagram accompanying the decision on page 304 will furnish some idea of how the ore bodies lay in the lime.

In the case at bar we have continuous ore lengthwise, diagonally and across the vein, in extent far exceeding anything found in the limestone in the Eureka case.

The definition given by Mr. Justice Field in the above case has received the approval and commendation of this Court. See Iron Silver Mining Company vs. Cheesman et al., 116 U. S., at p. 534. The following definition was also approved in the same case:

> "To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral, or mineral bearing rock, and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of

ore within such boundaries will prove the existence of a lode."

See also Stevens vs. Williams, 23 Fed. Cases, p. 40, read pp. 42, 43.

Petitioners, in support of their contention that this lime belt was not to be regarded as a lode within the meaning of the Act, cite the cases of the Mt. Diablo Company vs. Callison, 5th Sawyer, 439, and the Waterloo Mining Company vs. Doe, 82 Fed. Rep., p. 45. Each of these cases is readily distinguishable from the one with which we are dealing. The first presented a case of two fissure veins parallel and plainly bounded, and turning to p. 443, it appears the two veins were separated by a rock called by the witnesses the Black Dyke, which was from twenty-two to thirty feet in thickness, which was practically barren, carrying but a trace of silver, and that only in some places; that this Black Dyke, so-called, was found continuously, so far as developments had gone, between the two veins.

The second presented a case of parallel fissures in a volcanic rock, termed liparite, and at p. 52, *et seq.*, it appears that there was a well defined foot wall to the north vein, and a hanging wall to the south vein: "The evidence also shows that there was a clearly defined foot wall to the south vein, and a clearly defined hanging wall, other than the hanging wall of the south vein, to the north vein."

The case of Grand Central Mining Company vs. Mammoth Mining Company, 29 Utah p. 490, (s. c. 83 Pac. Rep. 648) is cited and quoted from at some length in petitioners' brief. The facts in that case bore but little re-

semblance to those we have here to deal with. In that case what the court found to be the vein or lode lay in the heart of a body of limestone several miles in length and width. One continuous body of ore had been developed on its course and strike for more than 2000 feet, and at no place was this ore body more than 100 feet in width. It had no defined boundaries other than the limits of mineralization. This great channel of ore was found by the court to have been formed by a replacement of the limestone throughout its entire length. It was bounded on either side by limestone which differed not at all from that found throughout the entire limestone area. And throughout the length of this ore channel or vein, barren limestone was everywhere encountered within a few feet of valuable ore. Of necessity, in such a case, there was nothing which could be looked to or accepted as the boundaries of a lode or vein other than the limits of mineralization.

(d) But it is urged in the brief of petitioners that the Circuit Court passed upon the facts and found and determined that this lime belt was not, as claimed by respondent, a lode or vein; and also found and determined in favor of petitioners' contention as to the Kempton bedded vein and the Ashland fissure vein, and they claim that these findings of the Circuit Court should have bound and concluded the Circuit Court of Appeals. (Petitioners' Brief, pp. 122-135.)

We admit the general rule is, that upon an appeal the appellate court will presume that the findings of the Trial Court are correct, unless it appears that such findings are

clearly against the weight of the evidence. But here the Circuit Court made no findings of fact, and in dismissing the bill, expressed no opinion upon the facts. It cannot be determined from the record whether the decree of dismissal was based upon matter of fact or matter of law. There can be no presumption in favor of the decree, because it cannot be ascertained therefrom, or from the record, taken as a whole, what view of the facts was entertained by the Trial Court. It was simply decreed: "That upon consideration of the pleadings and all the evidence taken and given at the hearing of said case, that the bill of complaint herein be, and the same is, hereby dismissed at plaintiff's cost."

It may well be, for aught that appears from the record, that the Circuit Court concluded that the facts were in accordance with respondent's contention, but that the law upon these facts was with the petitioners. Of necessity, therefore, the appellate court must examine all the evidence and draw its own conclusions of fact, and then determine the rules of law applicable thereto. This seems to have been the view taken by this court in Gumar v. Colorado Oil Co., 152 U. S. 88.

In that case it appeared that in the court below a large amount of testimony had been introduced by the respective parties. There was a sharp conflict in the evidence. The trial judge entered a decree in favor of the complainant, but, as in the case at bar, gave no opinion and made no findings of fact. In considering the appeal, this court said, (p. 91):

"We are compelled to pass upon this case without

the assistance of any opinion or findings of fact by the court below, and hence it has been necessary for us to consider all the evidence. The bill is definite and precise in its allegations and waives answer, under oath. The answer, although without weight as evidence, is also precise and specific in its allegations denying the equity of the bill.

There is no view that we can take of the evidence that enables us to reconcile the conflicting testimony of the witnesses respectively examined in behalf of the parties."

The court then proceeds to examine the evidence and show its conflicting character, and after this review, disposes of the case, as follows (page 95):

"Upon the whole, our examination of the evidence fails to convince us that the complainant is entitled to the relief prayed for. We therefore remand the case to the court below with instructions to set aside the decree and dismiss the bill."

Further, in reply to this claim of petitioners, we submit that the decree of dismissal was manifestly erroneous, and that it could not be sustained in any possible view that could be taken of the evidence.

It is alleged in the bill that respondent is the owner and in possession of all of the ore bodies underlying each of the claims, the Jordan Extension, Northern Light, Grizzly and Fairview, and that the petitioners assert an adverse claim of ownership thereof. The answer to the bill asserts ownership in the petitioners of all of the ores lying beneath each of said claims.

Now, if a vertical plane, parallel to the end lines of the Kempton Claim, were passed through the point where petitioners claim the Kempton vein terminates in its course easterly, and such plane were extended in its own direction northerly, it would cut in twain a vast ore body, as shown by the undisputed testimony, leaving a large portion thereof east of this imaginary plane, and under respondent's Jordan Extension Claim.

VI.

Petitioners are not entitled to any extralateral rights upon the broad lode or vein, by virtue of their ownership of the Kempton Claim, which would reach any of the ore bodies in controversy, notwithstanding said claim is for a portion of the length thereof laid upon the lime lode, and includes a portion of the width thereof, because the balance of the width of the lode is embraced within the Jordan Lot 64 and the Mountain Gem Claims, each of which is senior to the Kempton. And the junior locator of a claim covering a portion only of the width of the apex of a broad vein is not entitled to any extralateral rights thereon, as against a senior locator. Neither are petitioners entitled to any extralateral rights on this broad vein by virtue of their ownership of the Ashland Claim, which would reach any of the ore bodies in controversy, because the Ashland, so far as any portion thereof is laid upon the limestone belt, is laid crosswise thereof, and further because substantially all that part of the Ashland which is laid upon the limestone lode was by the Ashland Patent excluded to the Kempton.

Assuming, as we do, that the Jordan lime belt is to be treated as a single lode or vein, there arises the follow-

ing legal question: What extralateral rights, if any, upon this lode, have petitioners, or any of them? It has been settled that a senior location, including a portion of the width of the lode at its apex, is entitled to the entire vein as it goes to the deep, as against the junior location, which may itself include the remainder of such width of apex.

In Argentine Mining Co. vs. Terrible Mining Co., 122 U. S., the court said, pp. 484-5:

> "Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

From the statement of facts in the case it appears that the defendants' claims were junior in location to the plaintiff's Adelaide claim, also that defendants' claims were patented, and that there was a surface conflict, while it does not appear that the Adelaide had been patented.

See also

Bunker Hill, etc. Co. vs. Empire State, etc. Co., 106 Fed. Rep. 471;

The same case on appeal, 114 Fed. Rep. 417;

Montana M. Co. vs. St. Louis M. Co., 104 Fed. Rep. 664;

Last Chance M. Co. et al. vs. Bunker Hill S. M. & C. Co., 131 Fed. Rep. 570-578;

where it is held that the fact that a vein or lode is of such width on the surface as to extend beyond the side lines of

the claim located thereon, does not affect the extralateral rights of such claims against a junior location.

The same doctrine is announced in the case of the Empire State-Idaho M. & D. Co. vs. Bunker Hill & S. M. & C. Co., 131 Fed. Rep. 591, 604-605; St. Louis M. & M. Co. vs. Montana M. Co., 104 Fed. Rep. 664; Empire State-Idaho M. & D. Co. vs. Bunker Hill & S. M. & C. Co., 114 Fed. Rep. 417, 419-420.

In the case last above cited, the question of extralateral rights where two or more locations cover a portion of the width of a lode or vein, was discussed at length. The case supports our contention.

It will be seen by reference to the diagram in that case, page 418, that the San Carlos, which was the junior location, was so laid upon the apex of the vein, as to cover a very substantial portion of the width thereof. Indeed, at the westerly end of the San Carlos location, it covered practically the entire width of apex. The Viola, the senior location, covered the balance of the width of apex. As to the surface of the San Carlos including that portion of the surface which was laid upon the lode, it had the title and exclusive right of possession, upon which surface the owners of the Viola might not enter. Both the Viola and San Carlos were so laid upon the apex that a portion of the width thereof traversed each claim from end to end. And it was held that the Viola, being the senior location of the two, was entitled to the entire vein as it went to the deep, between planes drawn through the end lines thereof extended in their own direction. It was also held that the San Carlos had extralateral rights upon

the vein between planes drawn through its end lines; that the extralateral rights of the Viola were prior to those of the San Carlos, and that such rights of the Viola must be fully protected and satisfied, that they could not be, to any extent, interfered with by the owners of the San Carlos.

(In our brief filed in opposition to petitioners' application for a writ of certiorari, we made the same comments upon the Viola-San Carlos case that we have here made, and stated that it was on "all fours" with the case with which we were dealing. We did not intend to be understood as citing the case in support of our contention upon another question, namely, that the mere fact that the owner of a junior location had been permitted to obtain a patent therefor, without any adverse claim on the part of the owner of a senior location which conflicted therewith, does not preclude the senior locator from showing in any subsequent litigation between him and the junior locator, involving the title of the senior locator to that portion of his claim and the lode therein, which is outside of the conflict area, that his location was in fact prior in time to that of the junior location.

The Viola-San Carlos case did not deal with that question at all. However, opposing counsel evidently understood that we cited the case to support this proposition and say that our citation of the case as being "on all fours" with the case at bar, justifies the criticism "That it is a very good illustration of the manner in which a plausible argument may be constructed by stating a half truth and by omitting such of the facts as do not support the foregone conclusion."

We admit that with counsel's understanding of the point to which the case was cited, the criticism would not be unjust. But we submit that an attentive reading of the brief would have prevented the misunderstanding.)

It follows, under the doctrine announced in the cases above cited, that the petitioners, claiming under a junior title, are not entitled to any extralateral rights upon the broad lode, which would conflict with the extralateral rights of the senior locators, but that respondent would be entitled to take the lode in its entirety as it goes to the deep (and would therefore be entitled to the ore bodies in controversy, aside from its title thereto, based upon its presumptive common law right) unless it was deprived of such right by failure to assert an adverse claim to the Kempton application for patent, as contended by counsel for petitioners.

We submit that the general rule is that the title conveyed by patent relates to the date of the location on which it issued.

Smelting Co. vs. Kemp, 104 U. S. 633-647;
Cahoon Gold Min. Co. vs. Ajax Gold Min. Co., 182 U. S. 499-510;
Stark v. Starr, 6 Wall. 418;
Kahn v. Old Telegraph Co., 2 Utah 174.

(In the case now before the court, patent for the Jordan Lode Mining Claim Lot 64, was issued upon an application made Sept. 17th, 1863, and the patent for the Mountain Gem Lot 475, was upon a location made August 20th, 1864. The patent for the Kempton bears date February 23rd, 1875, final entry and payment having been made, as

appears from the patent, on the 27th day of April, 1874.

Now, as shown by the diagram, Exhibit "T," the Jordan Lot 64 is the only claim laid upon this limestone belt or lode from its easterly extremity westerly to where the Jackson Incline is shown upon said diagram as crossing one of the side lines of the Kempton Claim, and running through Post 4 to Post 5 of that claim, and that a portion of the width of the apex of the lode continues in the Jordan Lot 64 to the point where the south side line of the Jordan intersects the same south side line of the Kempton; and from thence easterly to and beyond the westerly end line of the Mountain Gem a portion of the width of the apex lies in the Mountain Gem as patented, and a part thereof within the Kempton Claim. And that proceeding westerly from the westerly end line of the Mountain Gem, almost the entire width of the lode lies outside of—south of—the Kempton.)

It is contended by petitioners, however, that this rule has no application to a case where the senior locator of mining ground suffers a junior locator, of a portion of the same territory, to go to patent on his junior location, without filing and successfully maintaining an adverse claim. We freely admit that this is true so far as the surface conflict is concerned, and admit that it is true also as to extralateral rights on any vein, the *entire* apex of which may be found within such surface conflict, and also as to any vein, *no portion of the width of the apex whereof*, is found within the senior location; but we insist that beyond the scope of this admission, the contention of petitioners is not well founded. Their position is:

That when the owners of the Jordan and the Mountain Gem suffered the Kempton to go to patent without protest, they were thereby and thereafter forever barred and estopped from contending that their claims were located prior to the Kempton, not only as to any portion of the surface area included within the Kempton patent, but also as to every part and portion of the Jordan and Gem claims lying outside of such area. They say an application for patent for a mining claim is a proceeding *in rem*, and that the issuance of a patent thereon binds and concludes all the world. This also we concede. But they further contend that the issuance of the patent in and of itself not only determines that the patentee has the better title to the conflict area between the location on which his application is based, and that of another location held by some third person, but that it is also a conclusive determination that his location is in fact prior in time to such other. This latter branch of their contention we deny emphatically.

When one applies for a patent to mining ground, and another claims that the ground, as surveyed for patent, conflicts in part with a location owned by him and files his adverse claim and brings his suit to determine the right of possession as between him and the applicant, pursuant to the Act of 1872, the title and right of possession to the surface conflict is alone involved.

Counsel for petitioners say that a proposition more destitute of legal sanction than this can scarcely be imagined. The proposition, however, was approved by the Circuit Court of Appeals in this case, 134 Fed. p. 769.

And in 2nd Lindley on Mines, Sec. 730, it is said: "The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts, or questions involving extralateral rights, are not the subject of adverse claims.

We submit that in such a suit there are no questions of law or fact involved other than those which have to do with the right to possession of the contending parties to the surface area in conflict. What, if any, extralateral rights upon a lode the prevailing party may be entitled to, must be determined in another action.

The petitioners to maintain their position must show that a patent for the Kempton could not have been issued unless it had been determined as a matter of fact that the Kempton location was first in time.

He who in any suit in equity, or action at law, claims that his opponent is barred or estopped from asserting or denying a given fact, on the ground that in some former proceeding, or in a former action between the same parties, on a different cause of action and involving a different subject matter, the particular fact was determined, has the burden of showing clearly either that such fact was directly involved and passed upon in such former proceeding or action, or that the judgment or determination rendered or made therein could not have been rendered or made without passing upon that very fact.

Both the Jordan and the Gem were located prior to any legislation of Congress on the subject of locating min-

eral lands—when the subject was governed wholly by the local laws and regulations of the district.

What were the local laws and regulations of the West Mountain Mining District at the time these several claims were located? Did they prohibit the taking of any surface ground except such as might be necessary for buildings to be used in the working of the mine? We are not informed.

[1st Lindley on Mines, Sec. 58 (2nd Ed.).]

Even under the Act of 1866, the locator of a mining claim was not required, nor permitted, to locate a tract of ground. All that he was permitted by that Act to do by way of location, was to locate a lode, and only when he made application for patent under the Act, was he required to file a diagram "so extended laterally, etc.," as to conform to the local laws of the district. See 14th Statutes at Large, 252, Sec. 2.

In the case of Del Monte M. Co. vs. Last Chance M. Co., 171 U. S., it is said by this court, at page 64 (speaking of the Act of 1866):

> "Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was 'fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the

> vein had no title. As might be expected, the patents issued under the Statute described surface area very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom."

What then was the limit of surface allowed by the local laws of the West Mountain District while the Act of 1866 was in force? Peradventure none except such as was necessary for the convenient working of the mine. If so, there could have been no surface conflict between the Mountain Gem and Kempton. Hence, no right to oppose the application for the patent. We cannot be estopped if we had no chance to be heard; we could have had no chance to be heard if there was no surface conflict. The burden was upon petitioners, who rely upon the estoppel, to show what the facts were in this regard. They made no attempt to do so, but contented themselves with raising the question of estoppel upon the final argument without evidence of any of the essential facts upon which to rest it.

But conceding for the sake of the argument that there was a surface conflict between the Gem and the Kempton: Does the issuance of a patent to the Kempton, including such conflict, necessarily determine that the Kempton location was prior to it? By no means.

It might well be for aught that appears that prior to the application for patent to the Kempton Claim, that that claim, as well as the Jordan Lot 64 and the Mountain Gem Claim were all owned by the same parties, and that

these owners conveyed the Kempton Claim to Ural, Colbath and Schonberg, who were the applicants for the Kempton patent. Would they thereby invest the Kempton owners with the right to insist that the location thereof was prior to that of the Jordan and Kempton? To ask the question is to answer it. And yet, if such were the fact, neither the owners of the Jordan, nor the owners of the Mountain Gem, could have made any adverse claim to the Kempton application for patent. Even under the Act of 1872, by virtue of which the locator of a mining claim is required to locate a tract of ground within which he has discovered a vein, and to so mark his location as that its boundaries can be readily traced, the issuance of a patent to a junior locator, including a claimed conflict with a senior locator, would not estop the latter from showing that his location was in fact senior to that of the patentee, although it would preclude him from asserting any title by right of such prior location, or otherwise, to the conflict area. Take a simple test: A, the senior locator, has embraced within his location the greater portion of the width of apex of a broad lode, and has marked his location definitely on the ground; B, a junior locator, has also laid his claim so as also to embrace a portion of the width of apex of the same lode; now B applies for a patent, and A adverses, claiming that the ground for which B has so applied conflicts with A's earlier location; B replies, admitting that A's location was prior to his, and that it covered a portion of the width of the vein, but insists that A so marked his location on the ground as to exclude the conflict area; B's contention in

this respect is successfully maintained, judgment goes in his favor, and he obtains a patent including the conflict: Has it thereby been adjudicated that B's location was prior to A's? Of course not. Has it thereby been determined that A's earlier location did not include a portion of the width of the vein? Again we say, of course not.

Our friends are seeking to invoke the doctrine of *res judicata*, which in its two branches may be stated as follows: First, a judgment between parties in one action or proceeding, is in a second action between the same parties or their privies involving the same subject matter, and founded upon the same cause of action as the first, an absolute bar not only as to every matter which was actually litigated and determined in the former action, but also as to every other matter which might have been litigated and determined therein.

Second: In a second action between the same parties founded upon a different cause than that involved in the first, or involving a different subject matter, the judgment in the former action is a bar only as to such matters as were in fact put in issue and determined in the former; it does not conclude the parties at all as to matters which might have been, but which in fact were not litigated or determined in the former suit.

In applying the latter branch of the doctrine of *res judicata* it must— either appear affirmatively that the particular facts (claimed to have been adjudicated) were determined in the former suit, or that the verdict, judgment or decree therein, of necessity could not have been rendered without passing upon and determining those

facts. The estoppel which the petitioners are seeking to invoke here falls within the second branch, as above stated, of the doctrine of *res judicata*. And the fundamental fallacy in the position taken by our friends is found in the erroneous assumption that a patent cannot issue which includes a conflict between two mining claims without of necessity determining that the patentee is entitled thereto by reason of the fact that the location under which he claims is in fact prior to the location of his adversay; while it must be at once apparent that notwithstanding his adversary's location might have been first in time and have included a portion of the width of the apex of the vein, yet he could be defeated in the patent proceedings as to the alleged conflict area upon grounds which do not involve or touch at all the question of priority.

Let us here call attention briefly to some of the authorities upon the doctrine of estoppel. "The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference and argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not deter-

mined." 1st Hermann Estoppel, pages 289, 290. And again on page 293:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, * * * * * it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the same parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence aliunde, consistent with the record, may be received to prove the fact; but even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be concluded."

In Lewis vs. O. N. & T. Co., 125 N. Y., it is said at page 348: "In a case where a judgment may have proceeded upon either or any of two or more different or distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact, must show affirmatively that it went upon that fact, or else the question is open to a contention." Soderberg vs. Armstrong et al., 116 Fed. 709.

In Russell vs. Place, 94 U. S. 606, the rule is stated as follows at pages 608, 609: "The general rule with respect

to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence is this: 'That to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.' "

And in Cromwell vs. County of Sac, 94 U. S. 351 (which has ever since been regarded as a leading case upon this subject), the Court says at page 353: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." And at page 356: "It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined

might have arisen and been adjudicated, therefore such possible question is to be considered as excluded from consideration in the second action between the same parties upon a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Apply that language to petitioners' contention here. Let us suppose that there are two mining locations substantially parallel and each including a portion of the width of a broad vein at its apex; the junior locator applies for a patent, and by his survey includes within his application an infinitesimal piece of the territory which was included in the senior location, say one one-thousandth of an acre out of one corner of the senior claim; the senior locator fails to adverse the application because the area, so wrongfully included within the junior application, is so insignificant and of such little value that it

would not justify the expense, trouble or annoyance even of a contest, and so suffers the junior locator to obtain his patent as applied for: What is the result according to petitioners' contention? This, namely: That thereby the senior locator not only lost this infinitesimal conflict, but that in any subsequent action that might arise between the parties involving any extra lateral portion of the lode outside the conflict area, the senior locator would be estopped and precluded from showing that his location was indeed the first one made upon the lode. Such is not the doctrine of *res judicata* as expounded by the courts, as we understand the decisions.

The result to which the doctrine contended for by petitioners would lead may also be illustrated by the diagram opposite, upon which is shown the apex and strike of a lode which traverses "A" lode from end to end, crossing both of its end lines, and also traversing the "B" lode in like manner. It also shows that there is a slight surface conflict between the two locations.

We will suppose that Mr. Smith was the locator and is the owner of the "A" lode mining claim, and Mr. Brown was the locator and is the owner of the "B" lode mining claim; now Smith's claim was first located, and therefore he—prior to issuance of a patent for either claim—was unquestionably entitled to follow the vein extra laterally between vertical planes drawn through the end lines of his claim, extended indefinitely in their own direction, as shown by the dotted lines on the diagram. But Mr. Brown, the owner of the "B" lode, first applied for and obtained a patent for his claim, including the small

Apex of Lode
"A" Lode
located May 1, 1890
patented May 20, 1895
B Lode

surface conflict area; Smith, failing to adverse the application (the surface conflict being regarded by him as possessing no value whatever, and not justifying, therefore, the expense or even the annoyance of litigation). What under the contention of our friends upon the other side, is the result? They say the issuance of this patent has conclusively determined that the "B" lode claim was the first one located and that the owner of the "A" lode claim is forever estopped to show the truth, namely, that his claim was in fact the prior location; that by his failure to adverse the application for patent, he not only lost the surface conflict (which we admit), but that he has also lost substantially all of his extra lateral rights; for that now the owner of the "B" lode claim is entitled to all of the lode in its course downward, which lies between planes passed vertically through the end lines extended in their own direction of his location, as shown by the broken lines on the diagram, leading from the ends of the "B" lode and thus ultimately the extra lateral rights of the owner of the "A" lode claim will be entirely cut off.

Again, it is provided, Section 2336, United States Revised Statutes:

> "That where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

Now, let us suppose: That one Smith makes a valid location upon the outcrop or apex of a vein, which, on its course, traverses his claim from end to end; that subsequently Brown makes a parallel location upon the apex of a vein, which, in its course, traverses in like manner

his location; that there is a slight surface conflict between the two locations, arising from the fact that the north side line of the second location, instead of being exactly coincident with the south side line of the first, runs a few feet north of the same; that the two veins, so appearing upon the surface in their course downward unite, and that from the point or line of union to the deep, there is but one vein.

While neither of these locations is patented, Smith, the locator of the first, is unquestionably entitled to all of the vein from the point of union downward, but now the locator of the second claim applies for and obtains a patent therefor, including this slight surface conflict. Smith, realizing that such surface conflict is utterly valueless, failed to adverse the application of Brown for a patent. What is the result?

Counsel for petitioners say: That the issuance of this patent conclusively determines that Brown's location antedated that of Smith, and that Smith is thereby forever estopped from asserting the truth, namely, that in point of fact his location was first in time, and that now, not Brown, but Smith, is entitled to the entire vein from the point of union.

The soundness of a doctrine leading to such results as these, may well be questioned.

The case of Montana Company vs. the St. Louis Company was twice before the Circuit Court of Appeals for the Ninth Circuit, the first case being found in 102 Fed., p. 430, and the second 104 Fed. 664. From the first case we learn that the Montana Company as owner of the

St. Louis mining claim had made its application for patent therefor; that the owners of the Nine Hour claim, the predecessors of the St. Louis Mining Company, filed an adverse claim and brought their suit in pursuance thereof, claiming that the Montana Company's claim, as surveyed for patent, was made to include a 30-foot strip of ground which belonged to the Nine Hour claim; that by agreement between the parties it was provided that the Montana Company should go to patent upon its application and should thereafter convey the 30-foot strip to the owners of the Nine Hour, which was thereafter done accordingly, and the question was what were the rights of the respective parties under this agreement and conveyance, and at pp. 432 and 433 the court says:

> "If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a *surface line of division* between the two claims, without affecting rights to the ores beneath the surface, otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundaries upon the very line which they contended was the true line?"

In the second case the court was called upon to de-

cide what were the extralateral rights of the respective parties, in view of this conveyance, on the Drum Lummon vein, and the court carried to its legitimate conclusion the decision in the former case.

The diagram found at page 665 (a reproduction of which for convenient reference is found opposite) shows that the moment you pass the 108-foot plane a portion of the width of the apex passes out of the St. Louis into the 30-foot strip, and from thence until you get to the 133-foot plane, a portion of the width of apex is in one claim and the remainder in the other, and that at the latter plane the entire width of apex passes out of Montana ground. The St. Louis Company claimed that the extra lateral rights of the Montana Company ceased at the first plane, while on the other hand it was claimed by the Montana Company that its extra lateral rights upon the vein were not terminated until the 133-foot plane was reached. The decision was in favor of the Montana Company and was rested expressly upon the ground that having the older location covering a portion of the width of the apex, it was entitled to the whole vein to the extent that any portion of the apex continued in its territory.

(Referring to this case counsel for petitioners say (brief, p. 89) that "there was no lode apexing in the 30-foot strip. Counsel have failed to observe the diagram accompanying the decision.)

But petitioners in their petition for a writ of certiorari, claim that the decision of the Circuit Court of Appeals herein conflicts with the decision of this court in the case of Argentine Mining Company vs. Terrible Min-

St Louis Claim

ing Company, 122 U. S., and also with the decision of the Supreme Court of Utah, in the case of Lavagnino v. Uhlig, 26 Utah.

The latter case was one where the defendants had made an application for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims, and the plaintiff had in due time filed in the Land Office an adverse claim to a portion of each of the Uhlig claims, which overlapped and included a part of the "Yes You Do Mining Claim," and thereafter, in due season, brought his action to determine the right of possession of that portion of the Uhlig claims which conflicted with the Yes You Do. It appeared on the trial that one J. Fewson Smith was the locator of the Yes You Do; that at that time and at the time of the trial he was a deputy United States mineral surveyor "attached to the office of the Surveyor General of the district of Utah;" that he had an interest in the litigation, notwithstanding he had made a formal conveyance thereof to the plaintiff Lavagnino. Upon these facts appearing, the trial court held that the location by Smith was in violation of Section 452 Revised Statutes of the United States, and therefore void, and that being void, the plaintiff acquired no rights whatever under the deed to him from Smith, and excluded Smith's notice of location and said deed to the plaintiff. The defendants then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2, and in rebuttal the plaintiff offered to show that the Levi P. and Veta mining claims were at the time of the location of the Uhligs valid and subsisting claims and covered the discoveries of both the Uhlig No. 1 and No. 2, and that

the Levi P. and Veta were owned by one Andrew P. Mayberry. This offer was objected to, and the objection sustained, on the ground that no adverse claim based upon the Levi P. and Veta claims had been made within the prescribed period. (The summons was quashed as to the defendant McKernan, and the action discontinued as to him. Pending the action, the other defendant, Edmund H. Uhlig conveyed all his interest in the Uhlig No. 1 and No. 2 to the St. Joe Mining Company.) The trial court adjudged that the St. Joe Mining Company and the said McKernan were the owners, in possession and entitled thereto, of the premises in dispute. An appeal was prosecuted to the Supreme Court of the State, and the decree of the lower court affirmed, both as to the invalidity of the Smith location and the ruling of the court sustaining the objection to the testimony offered with respect to the Levi P. and Veta claims. Upon the latter point, the court says, at page 19:

> "The failure of the plaintiff to show, in chief, any right to the premises in controversy, disclosed the fact that he was 'a stranger to the title' of the premises in dispute and that a nonsuit could, on motion, have been properly granted. So that a failure to establish the defendant's claim could in no way benefit him or validate his alleged title to the Yes You Do. Therefore the plaintiff had no more interest in or right to further contest the defendant's claim on the ground that the Levi P. and Veta were valid and subsisting claims than the said Andrew P. Mayberry himself or any other stranger had." * * *

And proceeds to cite and quote from cases in support of the proposition that where one makes an application

for a patent for a mining claim, any other claimant of an unpatented location which conflicts with the claim as surveyed for patent, must, within the time prescribed by the Act of Congress, file an adverse claim in the Land Office, or he will be precluded from objecting to the issuance of the patent. And at page 23 says:

> "We think it is clear, both from the language of the Sections of the Revised Statutes referred to and the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and, as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title, are likewise precluded from protesting on like grounds."

The plaintiff in the trial court, as we have seen, had endeavored to defeat the defendants on the ground that the Levi P. and Veta claims included the discovery point of each of the Uhligs, and were valid and subsisting claims. There must, therefore, have been a conflict between the Uhlig claims and the Levi P. and Veta claims, and it was with reference to this conflict that the court was speaking, as is apparent from the passage last above quoted.

In effect, the court simply holds that one who fails to file an adverse claim within the sixty days' period pro-

vided by the statute, is conclusively presumed not to have any claim or location the surface of which conflicts with any portion of the surface of the claim for which application for patent is made. That, however, is not the question which was presented to and decided by the Circuit Court of Appeals. Respondent did not assert, and the Court of Appeals did not hold, that it had any right to the area in conflict between the Kempton and Jordan, nor the Kempton and the Mountain Gem. On the contrary, it was conceded by us, and held by the court, that the patenting of the area in conflict to the Kempton "operated as a declaration or determination that within these surface limits the defendant's claim was superior, but not necessarily that it was prior in location."

The question as to whether, where one makes an application for patent for a mining claim, and so surveys it for patent as to include a portion of a location claimed by another party, and such other party fails to file his adverse claim, he would be estopped from asserting thereafter, in an action involving that part of his claim which lay outside of the conflict, that the location of his claim was, in fact, older in point of time, was not in any way involved in the Lavagnino case, nor is any such question even alluded to. The decision of the Lavagnino case conflicts not at all with the decision of the Circuit Court of Appeals in this case; on the contrary, it is in harmony with it upon the question as to what the effect is of a failure to file an adverse claim to an application for patent.

This brings us to a consideration of the question as to whether there is any conflict whatever between the de-

cision of the Circuit Court of Appeals in this case and the decision of this court in the case of Argentine Company v. The Terrible Company, *supra*.

The Argentine case was one where the plaintiff in the court below brought his action to recover certain mining ground, being part of what is known as the Adelaide lode. It appears from the statement of facts, 122 U. S., page 479, that plaintiff was the owner of the Adelaide mining claim; defendant below was the owner of the Camp Bird, the Pine and the Charlestown lode locations; that the Adelaide was the senior location, having been located in 1876, and the claims of the defendant—plaintiff in error—were located in 1877; that the Adelaide occupied on the surface longitudinally a northeast and southwest direction, while the said claims of the plaintiff in error occupied a position nearly north and south, with end lines practically east and west, thus crossing diagonally the Adelaide claim; that during the summer of 1880, the defendant below carried its mining operations through its own ground into the Adelaide claim, and that it sought to justify its action by asserting that in doing so it followed a vein which had its outcrop in its own locations. In the trial court, the defendant requested the court to instruct the jury as follows: "The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth,

pass beyond those lines and within the end lines of the [illegible]. The defendant here claims that the lode in controversy originates in its patented territory, by its top or apex, and descends upon its dip through and under the ground in controversy. If, from the preponderance of evidence you believe that the top or apex of the lode in controversy does, in fact, originate within the patented territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant." Which request to so instruct was refused.

This court, speaking through Mr. Justice Field, says, at page 484:

> "The instruction, as requested by the defendant, as a proposition of law is undoubtedly sound." * * * "Its refusal, however, did not prejudice the defendant, for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked, applied to that claim, cut off the right asserted by the defendant." * * * "But there are other grounds equally conclusive against the contention of the defendant below. The instruction asked assumes that the longest sides of its claims were their side lines. Such would, undoubtedly, be the case if the locations of the claim were along the course or strike of the lode."

And after quoting Section 2320 of the Revised Statutes of the United States, proceeds:

> "When, therefore, a mining claim crosses the course of the lode instead of being 'along the vein or lode,' the end lines are those which measure the

> width of the claim as it crosses the lode. Such is evidently the meaning of the statute." * * * "Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them."

In Section 587, Vol. 2, of Lindley on Mines (2nd Ed.), will be found a diagram, representing the said Adelaide claim and the said claims of the defendant in the court below; also, the course or strike of the apex of the vein involved in the case, and the "Argentine workings." From this diagram, it appears that all four of the claims were laid across the course of the vein at its apex, and that the workings of the Argentine Company extended beyond the east side line of the Pine claim and entered that portion of the Adelaide which lay to the east of a vertical plane drawn through the east side line of the Pine claim. That it was the work of the defendant in the Adelaide ground, east of the east side line of the Pine claim, which was alone involved in the action, is apparent, we think, from the language of this court, namely: "The lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein." * * * "and, as a consequence, *could not touch the premises in dispute, which are conceded to*

be outside of those lines and outside of vertical planes drawn downward through them."

The case involved no such question as is here involved, namely, whether a senior locator of a mining claim who suffers a junior locator to proceed to patent for a claim which to some extent conflicts with the senior location, is thereby forever precluded from showing, in an action involving the question of his surface or extralateral rights to that portion of his location which lay outside of the area in conflict, that his location was in fact earlier than that of the patented claim. There was nothing decided, or passed upon, in that case, which conflicts in any way with the decision of the Circuit Court of Appeals in this cause.

In the case of Jefferson Mining Co. vs. Anchor-Leland M. & M. Co., 32 Colo. 176-181, cited by petitioners, the ore body in controversy lay vertically beneath the surface of the conflict area, between the Anchor Claim and the Mattie L. Claim. The Anchor Claim went first to patent and included all of the conflict area. The court held that there was no question of extralateral rights involved in the case, but that the ownership of the ore body was controlled by the intralimital rights of the Mattie L. and Anchor, as patented. The court also determined that not only was the Anchor the senior patent, but that it was also located before the location of the Mattie L.

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It is true that in 2d Lindley, Sec. 783, the author says:

"So it would seem that where an adverse claim is filed, showing surface conflicts the judgment

> rendered in the action, upon the basis of which the patent ultimately issues, is conclusive in its effect, not only as to the surface area directly involved, but determines priority in favor of the successful litigant as to all rights flowing from the respective locations. The question of priority having been actually or presumptively adjudicated as to one part of the conflicting claim, the judgment necessarily extends to and affects the portion not included in the conflict area, and a subsequent conflict of underground rights arising in such a case must be determined by the priority actually or presumptively established in the patent proceedings."

The only cases cited in support of the text as quoted are Last Chance Mg. Co. vs. Tyler Mg. Co., 157 U. S. 683; Bunker Hill & Sullivan M. & C. Co. vs. Empire State-Idaho M. & D. Co., 109 Fed. 539, and Empire State-Idaho M. & D. Co. vs. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 420. A reading of the case from 157 U. S., *supra,* will show that it lends no support whatever to the text, but proceeds upon the ground solely that the question of priority had in a former action between the same parties been directly put in issue and actually determined therein. The case itself involved a question of ownership of an ore body lying beneath the surface of the Last Chance. It was manifest from the manner in which the vein at its apex traversed the Tyler and Last Chance claims, respectively (see diagram, p. 685), that the question of ownership depended solely upon the fact as to which of these claims was first located. It appeared that prior to the commencement of this action the owners of the Tyler had made application for patent for that claim, including the

triangle "A," shown on the diagram, which conflicted with the Last Chance location; that the Last Chance adversed the application and in due time brought suit, as required by the statute, in support of its adverse claim; that by its complaint in that action it alleged and based its right to recover upon the ground that the location of the Last Chance was prior to that of the Tyler, and solely upon that ground. Judgment was rendered in that action in favor of the Last Chance upon a finding of fact:

> "That at the time the said Tyler mining claim was located that portion of the ground so in conflict as aforesaid had been located as a part of the Last Chance mining claim, and was not subject to location by the locators of the Tyler mining claim."

The fact of priority having been expressly involved and determined in that action, this court, adhering to the doctrine of *res judicata*, held as a matter of course that the fact of priority could not be again litigated in a subsequent action.

Almost at the outset of the opinion we find this language: "The law with respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is, therefore, not conclusive in this as to matters which might have been determined, but only as to matters which were in fact determined."

Then after reviewing the pleadings, findings and judgment, the Court proceeds at 689 as follows: "Thus

it appears that the complaint alleges a priority of location, and upon that rests the right to recover * * * * The findings are express as to priority and contain no suggestion of any defect in the Tyler claim, or any fact in favor of plaintiff's right other than that of priority of location, while the conclusion of law and judgment recite and adjudge a valid location of the Last Chance mining claim on September 17th, 1885, and a right of possession by virtue thereof. Upon the record taken as a whole there can be no escape from the conclusion that the Court determined the question of priority of location, and upon this rendered judgment for the plaintiff." And at page 691: "But if we ignore the findings altogether and look simply at the judgment and the complaint, this will appear: 'The single ground stated in the complaint upon which superiority of right is claimed, is priority of location. A judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it can rest (but now note what follows): It is doubtless true, as suggested, that other questions may be litigated in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. *The only pleading upon which the case passed to trial and judgment was the complaint, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location.*"

Keeping in mind the facts in that case, one cannot read the opinion and escape the conclusion that the Court would have held that the question of priority of location

was not concluded by the judgment in the adverse suit, had it not clearly appeared from the record therein that the very question of priority was directly involved and expressly adjudicated in the adverse suit.

Reference to the diagram in that case furnishes ready illustration of how irrational it would be to hold that the question of priority of location is necessarily involved and determined by the judgment in an adverse suit. For instance: Let it be supposed that in the adverse suit the Last Chance had by its complaint (so far as the question now before us is concerned) simply alleged that it was the owner of, in possession of, and entitled to possession of, the triangular piece of ground "A," and that on the trial it had established that the Tyler, as located, never included the triangle; that fact being established, judgment would necessarily go in favor of the Last Chance, and the question of priority could not have been the subject of inquiry even.

The case of Bunker Hill S. M. & C. Co. vs. Empire-State Idaho M. & D. Co., 109 Fed., page 538, does indeed sustain Mr. Lindley. The court in that case holding that the issuance by the government of a patent conclusively determines the priority of the location for which the patent is granted over any other, and confers upon the patentee, not only the title to the entire surface claim, but also all extralateral rights given by statute as against the owner of an unpatented conflicting claim. And in support of this doctrine, the court cites: Gwillin vs. Donnellan, 115 U. S. 45; Mining Company vs. Rose, 114 U. S. 575; and Hamilton vs. Mining Company, 33 Fed. Rep. 562.

In no one of these cases was the question—even remotely involved—which is here under discussion, namely, whether a senior locator of a claim who suffers a junior locator to proceed to patent for a claim, which to some extent conflicts with the senior locator, is thereby precluded from showing in an action thereafter brought, involving the question of his surface or extralateral rights, as to that portion of his location which lay outside of the conflict area, that his location was in truth earlier than that of the patented claim. No such question was presented in either of those cases. No such question was considered or even alluded to in either of them.

The only other case cited by the court is that of Last Chance Mining Company vs. Tyler Mining Company, *supra*. The learned court, it would seem, overlooked the fact that while this court in the Tyler-Last Chance case, did, in fact, decide that the judgment rendered in the action brought by the Last Chance Company, in support of its adverse claim filed to the Tyler application for patent, conclusively determined that the Last Chance location was prior to that of the Tyler, nevertheless, the decision went upon the ground that this question of priority was directly involved in the action in which such judgment was rendered—that in that action, as shown by the complaint therein, the only ground upon which the Last Chance claimed to be entitled to the conflict area was that of priority of location.

The other case cited by Mr. Lindley, namely, Empire-State Idaho M. & D. Co. vs. Bunker Hill S. M. & C. Co., 114 Fed., simply follows the prior case in the 109 Fed., cit-

ing no other cases, (but limits the rule or doctrine announced to cases where there is in fact a surface conflict).

(It will be observed that both these cases are in sharp conflict with the decision of the same court in the case of St. Louis M. & M. Co. vs. Montana M. Co., 104 Fed., *supra.*)

The Circuit Court of Appeals in the present case, 134 Fed. Rep. 769, 776-777, seems to have truly apprehended just what the scope of the decision of this court was in the case of Last Chance Mining Co. vs. Tyler Mining Co.

We submit, therefore, that the patent to the Kempton established the surface boundary, or line of division, between the Kempton and the Jordan and between the Kempton and the Montana Gem. It also conclusively determined that the patentees of the Kempton had the title and exclusive right of possession to the surface conflict area—if any there was. But it was not determined by the issuance of the patent that the location of the Kempton antedated the location of the Mountain Gem or that of the Jordan.

What, if any, extralateral rights were carried by the patent could only be determined by developments in the ground such as would disclose not only the existence of a vein, but also where the top or apex of such vein was found and what its course or strike was within the limits of the patented surface. If within the conflict area there were found the top or apex of a vein, the *entire width* of which was included within such area, such vein would be conveyed by the patent to the owners of the Kempton; but if a part only of the width was so found within the Kemp-

ton surface, and the balance of the width of the apex was covered by locations senior to that of the Kempton, and such senior locations were so laid upon the course or strike of the vein at its apex, as to give to such senior location, or locations, extralateral rights, such extralateral rights could not be curtailed in any manner by the owners of the Kempton claim.

At pp. 45-57 of brief for petitioners it is urged that neither the patent to the Jordan, nor that to the Gem, can be carried back to the date of the respective locations on the doctrine of relation, because respondent failed to show what mining district the claims were situated in; what the rules, customs and regulations of such district were at the time of these respective locations; it failed to show that the locators of these claims had complied with the rules and regulations of the district; it failed to show when the lode upon which these claims were located was discovered by the locators thereof, or their successors in interest. All of which things it is claimed it was essential for respondent to prove before the doctrine of relation would apply. And many cases are cited which are supposed to countenance this position.

Among others, the case of Sullivan vs. Hense, 2 Colo. 424. That was an action of ejectment to recover the possession of an unpatented mining claim.

The case of C. R. M. M. Co. vs. Labanon M. Co., 9 Colo. 343, dealt with an unpatented mining claim, and it is impossible to tell from the decision what the nature of the action was.

The case of Golden Fleece Co. vs. Cable Con. Co., 12

Nev. 312, was one where the party had applied for a patent. Plaintiff had filed adverse claim in the Land Office and in due time brought his action, pursuant to Sec. 2326 of the Revised Statutes. Such also was the case of Becker vs. Pegh, 9 Colo. 589.

The case of Meydenbauer vs. Stevens, 87 Fed. Rep. 787, seems to be quite foreign to the point to which it is cited. The same may be said of the case of Campbell vs. Rankin, 99 U. S. 261.

The case of Jentzen et al. vs. Arizona Copper Co., 20 Pac. 93, was an action in ejectment to recover possession of an unpatented mining claim. It does not support the proposition to which it is cited, even as to an unpatented claim.

Pollard vs. Shively, 5 Colo. 309, was also a suit brought pursuant to Sec. 2326 of the United States Revised Statutes.

Harvey vs. Ryan, 42 Cal. 626, was an action to recover the possession of a mining claim, where it was held that mining customs, superseded district mining laws which had been generally disregarded.

Flick, etc. vs. Gold Hill M. & N. Co., 8 Mont. 298, was also a suit brought on an adverse claim, pursuant to an application for patent under the provisions of Sec. 2326. In all such cases, each party is an actor and neither can prevail unless he makes a case which would entitle him to a patent from the Government.

Brown v. Gurney, 201 U.S. 184

In the case of Creed Cripple Mining & Milling Co. vs. Uinta Tunnel Mining & Transportation Co., 196 U. S. 337, it was decided (we quote from the syllabus) that

"An entry of a lode mining claim, sustained by a patent, though conclusive evidence that at the time of entry there had been a valid location, does not preclude the owner of a tunnel site, located across the lode, who claims that his location was prior to any discovery in the lode claim, from showing the order of the steps taken to perfect the lode location, including the date of discovery, notwithstanding the provision of United States Rev. Stat. Sec. 2320, that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' "

In that case the date of the location of the lode claim antedated the location of the tunnel claim. The entry of the lode claim, however, was not made, nor patent therefor issued, until after the location of the tunnel-site. The defendant in its answer, alleged that in fact there had been no discovery of a lode in the lode claim until after the location of the tunnel site. This portion of the answer was, on objection, stricken out, as was also the evidence offered by the defendant in support thereof, (as appears from the statements of facts, found in the same case, 119 Fed. Rep. 164). Error was assigned upon these rulings and the case reversed in the Circuit Court of Appeals, and the latter's decision here affirmed.

That case decided that the patent did not conclusively determine that a discovery had been made at the time of the date of the location; that the date of the discovery was open to contestation; it was not determined, however, that where the exemplification of the record, upon

which the patent issued, showed that it was issued upon a location notice, there was no *presumption* of discovery at the time the location was made.

Not only did the exemplifications of the record upon which patents for the Jordan Lot 64 and the Mountain Gem were issued show that they were based upon locations dated Sept. 17, 1863, and August 20th, 1864, respectively, or forty years nearly prior to the trial of this action, but it was expressly stipulated by counsel for petitioners and agreed before the case went to the Court of Appeals that the patents for the Old Jordan and the Mountain Gem were based upon the said location notices respectively. (Record p. 545.)

To hold that in a litigation arising more than a third of a century after these locations were made, it was incumbent upon the respondent to show affirmatively that the original locators had complied with all the rules and regulations of the mining district in the making of their locations, and that a lode had been by them discovered at the time of the location, would be to establish a rule that must, in many cases, work grave hardship. Such proof, in most cases, would be absolutely impossible, owing to the death or absence of the locators, or any other witness who could testify to the facts.

In Cheeseman vs. Shreve, 40 Fed. Rep. 787, it is said, at page 791, by the court in its charge to the jury: "While it is true that in order to authorize the location of these claims the locator should have made a discovery therein of a vein of mineral ore and done certain work thereon and complied otherwise with the law regulating

such locations, yet you are instructed that the certificates of location are presumptive evidence of such discovery; and that the locators had complied with the law in this respect; and that after the lapse of many years, as in this case, every reasonable presumption should be indulged by the jury in favor of the integrity of the location; and that where, as in the case of *some* of these claims the original locators reaffirmed under oath on the witness stand that at the point of their workings, named in their location entry, they did discover such vein, then when the plaintiffs come here after the lapse of so many years and undertake to show by witnesses sent to these old openings with their accustomed debris to obtain evidence by inspection that no vein in fact was found by the original locators, such attack should be sustained by evidence so clear and persuasive, as to fully satisfy your minds that such claimed discoveries were in fact false."

In the case we are dealing with the burden of proof was, as we have shown, upon the petitioners, to establish their claim of extralateral rights. And when it was made to appear by the stipulation and agreement of counsel for petitioners, that there were other claims, to-wit: the Jordan and Gem, owned by the respondent, which were laid upon the broad lode, each including a portion of the width of the apex thereof, and that patents therefor had issued, based upon location notices which antedated the entry of the Kempton Claim by petitioners' predecessors in interest, it would seem that it was incumbent upon them to show, if the fact were so, that no discovery had been made of a lode in the Jordan or

in the Mountain Gem prior to the date of the entry of the Kempton.

Moreover, it was determined by the Circuit Court of Appeals in this case that this limestone belt was a lode from end to end and side to side. When it appeared, therefore, that the Jordan location was laid upon this lode and when it appeared that the Mountain Gem location was laid upon this lode, how can it be said that the evidence fails to show that the lode was discovered at the time the locations were respectively made.

But again, the claim of petitioners that respondent could not avail itself of the doctrine of relation, because it had failed to show in what district the claims were situated, or that its predecessors in interest in these respective claims had complied with the rules, customs and regulations of the district, and had failed to show when in fact the locators of these respective claims made a discovery of a lode therein, are claims which are made for the first time in this court.

At the opening of respondent's case in rebuttal, (Record p. 306, *et seq.*) counsel offered in evidence the exemplified copy of the various papers on which the patent to the Old Jordan was granted, including the patent itself, duly certified, and stated that the purpose of the offer was to show that the Jordan was an older claim than the Kempton, claiming that when the patent was granted, it took effect by relation to the date of location, to which offer the following and no other objection was made: "We object for the reason that it does not appear that the location notice of the Old Jordan is ma-

terial. This will involve a law question which will have to be decided, but of course we are not conceding that the older location takes the whole. We claim that, being an older patent, if there be but one lode—we claim there is a lode there in the Kempton and Ashland ground, but if there be a broad lode, we, having the older patent, take under the decisions the extralateral right as against the junior patent of a senior location." A similar offer and objection were made with respect to the Mountain Gem Claim.

Now, neither in the Circuit Court nor the Circuit Court of Appeals, was any claim made that the doctrine of relation did not apply to the Jordan and Gem Patents, because of the alleged failure of proof on the part of respondent as to discovery, etc. On the contrary in both the Circuit Court and Circuit Court of Appeals, the sole contention on the part of petitioners in this regard was, that the Kempton having been suffered to go to patent, it was thereby conclusively determined that the Kempton was located prior to the Jordan and Gem or either of them. Petitioners may not, therefore, be heard to urge these objections for the first time in this court.

In Houghton vs. Jones, 68 U. S. 702, it is said at page 705: "The plaintiff below, the defendant in error in this court, derainged her title from the Mexican Government through a grant issued in August, 1841, * * * by the then governor of the department of California, and sundry mesne conveyances from the grantee. It does not appear from the record that the grant was ever confirmed by the board of land commissioners appointed

under the Act of March 3, 1851, for the investigation of titles to land in California derived from the Spanish and Mexican Governments, or was ever presented to the board for its consideration; and it is the absence of any averment in these particulars which constitutes the first ground urged by the counsel of the plaintiff in error for the reversal of the judgment. His position is that under the act of March 3, 1851, if the grant were not presented within the period there designated, which period had expired when the action was commenced, the land was to be deemed a part of the public domain, and that no presumption is to be indulged in respect to such presentation in the absence of any averment on the subject. It is a sufficient answer to this position, that it does not appear from the record to have been urged in the court below. It may be that the objection was not taken from the knowledge of the party that the grant had been confirmed, and that proof of the fact could be readily produced. Objections of this kind cannot be heard for the first time in the appellate court. To entitle objections to consideration here, they must be presented to the court below in the first instance, at least if they are of a kind which might have been there obviated."

And in Belk vs. Meagher, 104 U. S. 279, it is said at page 289: "When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived and proceed with the case accordingly."

See also:

City of Findlay vs. Pertz et al., 74 Fed. 681;

O'Reilly vs. Campbell, 116 U. S. 418;
Thorne vs. Geo. H. Hammon Co., 71 Fed. 314;
Board of Com. vs. Sutliff, 97 Fed. 270;
Andrew vs. Chicago, St. P. & O. Ry. Co., 142 Fed. 320.

At page 48 of the brief it is asserted that the date of the location certificate of the Jordan claim is September 17, 1873. This is the first time that this has ever been asserted in any brief or argument on the part of the petitioner. Throughout the trial it was assumed by all parties that the location was made in 1863 and in the brief for respondent filed on the application for a writ of certiorari, it was stated at page 7 that:

"The Old Jordan mining claim, Lot No. 64, was located September 17, 1863, (Record pages 321-322. Erroneously printed at page 322 as 1873.)"

This statement was not challenged by the other side, but to the contrary at page 9 of the petition for the writ of certiorari, the following is stated:

"And moreover, they offered and introduced in evidence under the objection of the defendants that the same were immaterial and incompetent, the notices of location of the Jordan and Mountain Gem claims which show that they were located in 1863 and 1864 respectively, and prior to the patents to the Kempton and Ashland claims."

And at page 5 of the brief of petitioner on application for the writ, it is stated:

"When at the trial in the Circuit Court the com-

plainant came to rebut the defendant's title as evidenced by the Kempton and Ashland patents it offered in evidence a certain notice of location of the Old Jordan Claim, dated September 17, 1863. It is set out in the record as complainant's Exhibit V." (Record p. 321.)

In view of the fact that the petitioners in their present brief assert that the notice of location recites the location as having been made September 17, 1873, and that certain arguments are based upon this assertion, we have examined the original certified copy which is now on file with the clerk of this court, and we find that it is true that the date 1873 instead of 1863 there appears. This is the first time our attention has been called to this mistake in the original certified copy. Clearly it *is* a mistake because it will be seen by an examination of the notice which is contained in the exemplified copy of papers filed in the Land Office upon which the patent was granted that the date is there stated as 1863. Both parties have proceeded all the way through upon the assumption that this latter date was the correct date. It will be seen that the certified copy of the location notice, Exhibit V, was made and certified on the 13th day of October, 1873, and evidently the writing of the date 1873 instead of 1863 was a slip of the pen on the part of the certifying officer, probably due to the fact that he was making the copy in the year 1873 and mechanically wrote this date instead of the correct one. Certainly it would be unjust to permit petitioners to now take advantage of this perfectly apparent clerical error.

A party on appeal must abide by the position which

he assumed in the trial court, and he will not be permitted to raise a point for the first time in the appellate court which was not presented to nor considered by the trial court.

But it is conclusively determined by the Jordan Patent itself that it must have been issued upon a valid and perfected location prior to the Act of 1866, 14th Stat. at large, Chap. 262, page 251, before there was any legislation on the part of Congress with respect to the disposition of the public mineral domain. Under Section 4 of that Act no location could be thereafter made for more than 3,000 feet in one claim by any association of persons. The patent for the Jordan Lot 64 grants 5,200 linear feet upon the lode. The patent would be void, in part at least, had it not issued upon a location made prior to the passage of that act. It would be valid, however, if it were based upon a location made by an association of persons prior to the aforesaid Act of 1866. The presumption must be that it was so issued.

As said by this court in Smelting Co. vs. Kemp, 104 U. S. 636, 646: "A patent in a court of law is conclusive as to all matters properly determinable by the Land Department when its action is within the scope of its authority; that is when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed the doctrine as to the regularity and validity of its acts where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid it will be presumed that such circumstances existed."

We refer also to Carson G. & S. M. Co. vs. North Star Mg. Co., 83 Fed. Rep. 658, and the many cases cited in support of this proposition at page 664.

That the patent would be valid if based upon a location made prior to the act of 1866, *supra*, we submit, is established by this Court in the case of Glacier Mining Co. vs. Willis, 127 U. S. 471. Thus it appears that there was a valid location of the Jordan not only prior to the entry of the Kempton, but prior to the date of its location in 1871.

It is also said in the brief for petitioners that the location notice of the Jordan calls only for 2,200 feet in length. This is true according to the body of the notice, but the location was made by an association of 25 persons, each claiming one share of 200 feet with an additional share of 200 feet for the discovery, which aggregates 5,200 feet.

The complaint of petitioners that the Mountain Gem Claim is limited in extent, and has no extensive developments on or beneath the surface thereof, and has been imported into the case after lying undisturbed for many years should not receive serious consideration.

It is conceded that a portion of the lime lode is in the Mountain Gem claim, apart from any conflict with any other claim; and it is older than the Kempton. It cannot make any difference, therefore, whether the Mountain Gem be large or small, rich or poor, or whether or not any work has been performed on or beneath the surface thereof, so far as the legal rights flowing from the

possession of a portion of the apex of the lode are concerned.

Respondent is the owner of the Mountain Gem and is entitled to avail itself of any legal rights attaching to this claim in order to repel the unwarranted invasion of its property by petitioners. The fact that the Gem has not been extensively developed, and is of limited area can have no weight whatever in determining the legal effect of the possession of a portion of the apex of the lime lode under a senior location.

Respondent's property is sought to be invaded by petitioners, and respondent is authorized to bring to its aid any and all defenses it possesses.

The evidence shows that the Mountain Gem is one of a large number of mining claims owned and operated by respondent as one mine and mining property; that this mine has been worked and developed for many years, and a vast amount of money expended in the development thereof is apparent from the extensive workings shown upon respondent's maps. These operations have been carried on continuously, and it is not at all surprising that every portion of the vast territory owned by respondent has not been thoroughly exploited and developed. This is especially true of the Mountain Gem claim since no adverse claim to any of the ores belonging to the vein in part apexing in the Gem has ever been made until the assertion by petitioners of extralateral rights grounded upon the Kempton and Ashland claims. It is a matter of common knowledge that ore bodies belonging to a vein apexing in one claim are very often worked by the own-

ers thereof many hundreds of feet below the surface and vertically beneath the boundaries of other claims possessed and held by them without any development whatever upon or beneath the surface of the claim holding the apex of such vein containing the ore bodies.

To claim that but little work has been done on such apex claim, and because it is of limited area, the owner thereof is precluded from asserting and proving that it in fact controls the right to mine ore bodies vertically beneath the surface boundaries of other claims owned by him, is certainly a departure from all recognized conceptions of the mining law and decisions thereunder.

In petitioners' brief much is said about the Mountain Gem claim having been resurrected from the grave of oblivion, in order that it might be made the foundation for an assault upon long vested property rights of petitioners. Our learned friends dwell at much length upon the thirty years that their clients have devoted to the work of development of their properties; of the energy and enterprise they have displayed; of the vast sums of money they have expended in this work, and say that when after all these years of toil and sacrifice their courage is about to be rewarded by the immense and valuable ore bodies, which their lavish expenditure of capital have laid bare, the owners of the Mountain Gem seek to rob them of the fruits of their industry. But what are the facts upon which these statements are predicated? In all these thirty years the owners of the Ashland claim have driven a few hundred feet only of tunnel work—in all these years they never attempted to enter the territory

of the respondent until a month or such a matter before this suit was commenced; and in all these long years the owners of the Kempton have done but little work, as is made clear by their own maps and the testimony of their own witnesses. And never had they until a comparatively short time before the commencement of this suit attempted to extend their workings into respondent's territory, and even then, according to their own contention as to the facts, they followed a north and south fissure vein upon its strike beyond the boundaries of their own property into the Jordan Extension, and abandoned this work before suit was brought.

At pages 95 and 96 of brief for petitioners, it is insisted that the Circuit Court of Appeals misapprehended the true position of the side lines of the Jordan Lot 64; and that the opinion of the Court was based upon the erroneous assumption that the Jordan claim was 200 feet southerly of its real position, and on a reduced copy of petitioners' exhibit 21, they have drawn a red line designated "South side Jordan as placed by decision of Court of Appeals." The Court was under no misapprehension whatever as to the true position of this claim. In the statement of the case, 134 Fed. Rep. at page 770, the Court says: "The apex of a stratum of limestone, the strike of which is in a southwesterly and northeasterly direction is longitudinally bisected or divided by the Old Jordan, Mountain Gem and Kempton. The southerly side lines of the Kempton as patented are in part co-incident with the northerly side lines of the Old Jordan and Mountain Gem *as patented,* and the greater part of the

width of the apex of the limestone is south of the lines so *dividing the patented ground* and is within the surface boundaries of the Old Jordan and Mountain Gem." The conflict between the Jordan and the Kempton, and between the Mountain Gem and the Kempton, was patented to the Kempton. Now reference to petitioners' exhibit 21 will disclose that the south side lines of the Kempton are practically co-incident with the north side lines of the Jordan and Mountain Gem *as patented*—that is to say the north side lines or boundaries of the ground patented to the Jordan and Mountain Gem are co-incident with the south side lines of the Kempton. Reference to respondent's exhibit "T" will verify the statement of the Court that "the greater part of the width of the apex of the limestone is south of the lines so dividing the patented ground." That the Court of Appeals was under no misapprehension in this respect is made apparent by the petition for rehearing presented to the Court by petitioners, and may be found at pages 566, *et seq.*, of the record, and in which it is stated that one of the grounds upon which a re-hearing is asked are mistakes of fact by the court, and: "One of these mistakes of fact by the court is evidenced by its statement on line 35, page 2 of the printed opinion in these words: 'The southerly side lines of the Kempton and the southerly end line of the Ashland are in part co-incident with the northerly side lines of the Old Jordan and Mountain Gem, and the greater part of the width of the apex of the limestone is south of these dividing lines and within the surface boundaries of the Old Jordan and Mountain Gem.' A glance at any

surface map of either appellant or appellees will prove that the Old Jordan's northerly side line is not in any part of it within the disputed territory co-incident, or parallel with the southerly side lines of the Kempton, but to the contrary both the northerly and southerly side lines of both the Kempton and Old Jordan are practically co-incident or parallel throughout the area of disputed apex of the broad lode so-called, or in other words, the Old Jordan within such disputed area lies directly on top, so to speak, of the entire part of such broad apex in dispute, therefore the greater part of the width of the apex does not lie south of Kempton ground but lies within that ground as well as in Old Jordan. About this fact there can be no dispute because the evidence of both appellant and appellees proves it as above stated."

The Court's attention being thus called to the language of the opinion, made clear its meaning by changing the language so as to read: "the northerly side lines of the Old Jordan and Mountain Gem *as patented.*" And again, so as to read: "south of the lines so dividing the *patented ground.*"

At pages 27, 45 and 46 of the brief for petitioners it is claimed that the ground described in the Mountain Gem notice of location is not the same lode and ground described in the Mountain Gem patent, and at page 101 it is said: "We think an explanation of the radical difference between the supposed lode referred to in the notice and the alleged broad lode and the course of the Mountain Gem as actually patented, is to be found in an investigation of the situation. An inspection of the Moun-

tain Gem patent plat proves that between the intersecting lines of the Kempton U. S. Survey No. 55 and the Jordan Claim No. 64 and the Excelsior Claim Survey No. 366, there was a small triangular fraction of vacant ground three-fifths of an acre in extent. The Mountain Gem Claim, U. S. Survey No. 475, was unquestionably made to cover this triangular fraction not embraced within the boundaries of the claims named."

But as we have seen, it has been stipulated and agreed that the Mountain Gem patent was based upon the location thereof made August 20th, 1864, and no speculation on the part of counsel as to when and for what purpose the location was made is of any avail as against the patent.

As was said by Mr. Justice Field in Eureka Con. Mg. Co. vs. Richmond Con. Mg. Co., 4th Sawyer 302: "A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possession. In its potency, it is ironclad against all mere speculative inferences." We also here refer to the case of Carson City G. & S. M. Co. vs. North Star Mg. Co., 83rd Fed. Rep. 658, 663, 665.

In the brief for petitioners the following exception in the Mountain Gem patent is quoted, namely: "Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claims or lots Nos. 55, 64 and 366, and also all that portion of said Mountain Gem vein or lode, and all veins, lodes or ledges throughout their entire depth the tops or apexes of which lie inside of such

excluded ground;" and it is insisted that by this exception all of the Mountain Gem Lode, a portion of the width of the apex of which is found within the Kempton Claim, was excluded to the Kempton. Reference to the maps show that this would extend from the easterly to the westerly limit of the Mountain Gem claim, and under counsel's contention the Mountain Gem Lode throughout its entire length was excluded by the patent to the Kempton, and the Mountain Gem would have no rights upon the lode except within its surface boundaries extended downward vertically. This would be in violation and derogation of the grant contained in the patent, which is in the following language. (Record page 559): "Now know ye, That there is therefore hereby granted by the United States unto the said Old Jordan and Galena Mining Company the said mining premises hereinbefore described, and not expressly excepted from these presents and all that portion of the said *Mountain Gem vein, lode or ledge* and of all other veins, lodes and ledges *throughout their entire depth,* the tops or apexes of which are inside the surface boundary lines of said granted premises in said Lot No. 475 extended downward vertically, although such veins, lodes or ledges in their downward course *may so far depart from a perpendicular as to extend outside of the vertical side lines of said premises.*"

In this connection we assume that it has been established by the evidence that the Jordan Lime belt is a vein or lode. Now, confessedly a portion of the width of the apex thereof is within the Mountain Gem claim, and it having been located before the location of the Kempton, the

owners of the Mountain Gem would be entitled to extra-lateral rights on the lode if a patent had never been applied for or obtained. It was not within the power or jurisdiction of the Land Department to insert in the patent an exception which would take away these rights, and the exception itself is void.

In 1st Lindley on Mines (2nd Ed.), Sec. 171, the author, treating of reservations and exceptions in patents to mineral land, says: "The officers of the Land Department are merely agents of the government, and have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents of their own description, they could limit or enlarge without warrant of law." The author cites Davis vs. Weibold, 139 U. S. 507; Deffeback vs. Hawk, 115 U. S. 319; Talbot vs. King, 6 Montana 76, and Butte City Smokehouse Lodes Cases, 6 Montana 397.

In brief for petitioners it is claimed that counsel for respondent admitted on the trial "that the ore was continuous from the respective outcrops of the apexes respectively of the Ashland and Kempton veins in their respective claims," and in support thereof quote from the record as follows:

"Q.—Now, I wish, Mr. McNeill, you would describe what you know about the continuity of the vein from the top, where you say you mined the croppings in 1884, down to the lower workings in the Ashland fissure, if you know it?

"Mr. Dickson: As to continuity of the ore, speaking

of the bed vein, or the fissure vein, as testified to by other witnesses, we do not dispute, we do not question."

We add, that thereupon the following occurred:

"By Mr. Hiles: Do you make any question about the ore in the fissure being stratified differently from the ore in the bedded vein?

"By Mr. Dickson: Yes, sir." (Record, pages 282-3.)

All we desire to say in answer to this is, that from the outset to the present time, the claim of the respondent was, and is, that all of the ore bodies in controversy are found within the limestone lode hereinbefore referred to; that this limestone belt, lying within or between its enclosing quartzite walls, is so extensively mineralized that it can only be regarded and treated as one lode, within the meaning of the law; that it is not practicable to divide it into separate lodes; and we do not hesitate to repeat the statement or admission, that one can start in ore at the surface in this lime belt in many places and follow ore continuously to the deepest workings.

VII.

Finally, treating the mineralized and alter lime belt as the lode the Kempton can have no extralateral rights thereon, because no part of it on its course crosses either of the end lines of that claim, but the same enters and departs from the claim through two diverging side lines thereof.

The legal question here presented is in effect the same as that heretofore discussed under another head, and what is there said is equally applicable here and need

not be repeated. That the Jordan lime belt does course through the side lines of the Kempton; that it does not reach either of the end lines thereof, is shown by uncontradicted testimony.

At page 98 of petitioners' brief it is said: "It is to be remembered that there is no testimony on behalf of respondent that definitely fixes the lines of the limestone as indicated by the coloring (meaning Exhibit T.) Mr. Smith, who made the map, stated that he put the coloring on under the direction of Mr. Tyler and Mr. Holden. Mr. Tyler stated that he directed it to be put on from his examination of the ground." And it is contended by petitioners, in this and succeeding pages of their brief, that respondent's witnesses had falsely represented the position of this limestone belt; that its contact with the hanging-wall quartzite is in truth 200 to 250 feet further to the north than represented by respondent on its Exhibit T and by its witnesses. That thereby the belt of limestone was erroneously represented as crossing two of the southerly side lines of the Kempton Claim, while in truth and in fact it passes squarely through the westerly end line of the Kempton Claim.

At pages 328 and 9, Mr. Holden testifies as follows:

Q.—What is the blue on this map intended to represent?

A.—The blue is intended to represent the outcropping of the lode there.

Q.—The limestone?

A.—The limestone.

Q.—The yellow coloring here is intended to represent what?

A.—Merely intended to represent there is quartzite at that particular place; might have been carried on down further; but we have just indicated it there; the yellow indicates the quartzite and the green coloring the porphyry.

And Mr. Tyler, at page 429 (referring to Exhibit T), says:

"Upon the surface map I have denoted the boundaries of this lime belt, or the position of this lime belt, by the blue color, the blue tint."

And at page 431 he testifies as follows:

Q.—Was this blue tint upon the surface put there under your supervision and direction?

A.—Yes, sir.

Q.—And from observations made by you?

A.—From observations made upon the ground.

Q.—And are its easterly and westerly (should be north and south) limits correctly laid upon that map?

A.—Well, they are for the greater portion of it. There is a portion of the map near Cut D where the lime boundary is dotted in in place of being made as a solid line, I would say there has been great erosion and the ground is covered with debris and soil there so that it is impossible to determine the boundaries.

On the map opposite this page, entitled "Sketch Map No. 2," the boundary lines of the westerly part of the Kempton Lot 55, the hanging and foot wall quartzite (shown in hatched lines) bounding the westerly part of

the lime lode and the contour or elevation lines 1340, 1380 and 1420 are shown on a reduced scale in exactly the same relative position that they occupy on respondent's Exhibit "T." The surface stations S 333, S 334 and S 34, together with the elevations thereof respectively, are also thereon reproduced from the same exhibit.

The westerly part of the United States No. 1 West Drift is platted thereon in exactly the same position with respect to the boundary line of the Kempton Lot 55 that it occupies on petitioners' Exhibit 21, and the station numbers shown thereon and the No. 1 West Drift and branches thereof and the elevations of these stations respectively are as shown on respondent's Exhibit "S."

The Ashland Tunnel and West Drift (colored blue on Ex. 21) are placed on this map in exactly the same position with respect to the Kempton Lot 55 that they occupy on petitioners' Ex. 21.

The Ashland No. 2 Tunnel and the turnsheet level with station numbers and elevations therein, are placed hereon in exactly the same position with respect to the Kempton Lot 55 that they occupy in petitioners' Exhibit 21.

Now, in the brief of petitioners, page 97 (referring to the United States No. 1 West Drift), it is said:

"It will be noticed that the West Drift at its most westerly point north of the north edge of the limestone apex, as colored upon the map (meaning Ex. "T") is about 775 feet (meaning, we have no doubt, 775 feet north horizontally of the northerly edge of the limestone belt as shown upon Exhibit "T"). There is a dif-

ference in elevation between the level and the surface where the limestone is indicated of 303 feet, as shown by the difference between the elevation of the drift, 1037, and the elevation of the limestone 1340. Taking the dip of the limestone in the level to be 30 deg. as testified to by witnesses on both sides, and extending this limestone to the surface at an elevation of 1340 feet, we find that it will reach the surface at a horizontal distance from the west drift, of about 480 feet, or about 295 feet less than the most northerly portion of the lime outcrop as indicated to be by the coloring on the map; or, if it could be taken as true that the southerly limit of the limestone is as indicated upon the map, then there has been a failure to put to the north of it the limestone, where it would be brought by this extension, to the extent of 295 feet. This would carry the limestone, as to its northerly edge, to the center of the Kempton claim, and cause it to pass through the Jordan north side line near the corner No. 2 of the Northern Light, as indicated upon Exhibit "T," and 80 feet west of the westerly end of the Kempton, carrying it directly through the westerly end line."

Several important errors are found in the above quotation. There is nothing in the evidence to justify the assumption that the dip of the limestone belt is 30 deg. On the contrary, Mr. Holden, at page 324, testifies that the dip of the Jordan lime belt varies from 15 to possibly 40 deg., and he is the only witness on either side who undertook to give the maximum or minimum dip of the lime belt, and no witness undertook to give the average or normal dip. Again, near the point in the extreme

west end of the No. 1 West Drift, the elevation is 1026 feet, as shown at station 858, on the sketch map No. 2. Where a line drawn from the westerly end of the No. 1 West Drift, at right angles to the strike of the lime belt would reach the northerly edge of the lime belt, as shown upon Exhibit "T," at surface, the elevation is 1369 feet. This is arrived at approximately by taking the elevation of the contour lines 1380 and 1340, between which this point on the surface is found. The mean elevation of these two contour lines would be 1360, and within about 20 feet of this same point is found station No. S 333 at which the elevation is 1370.7 feet.

Now, between the point in the westerly end of No. 1 West Drift and this point on the surface the horizontal distance is 610 feet, not 775. The difference in elevation is 343 feet, not 303, and the angle of depression which will connect these points is 29 deg. 21 min.

And again at page 99 (referring to a raise from the west drift from the Ashland Tunnel, colored blue on Exhibit 21), it is said that the raise is carried up to within 18 feet of the northerly side line of the Kempton and within 60 feet of the projection of the westerly end line of the Kempton Claim, thus demonstrating that the limestone and also the Kempton bedded vein therein, passes through the westerly end line of the Kempton Claim.

Counsel do not inform us, nor can we ascertain from the record, at what angle this short raise is carried up. Neither do they give us any information as to the elevation of the same. For aught that is disclosed in the

record it may be not more than a few feet above the elevation of the drift.

The only elevation given upon petitioners' Exhibit 21, in connection with the Ashland Tunnel and the West Drift, running therefrom, colored blue, is found at the mouth of the tunnel and is 1306.3 feet. Now, at a point on the surface where a line drawn at right angles to the strike of the lode from the westerly end of this west drift would intersect the northerly edge of the lime belt, as shown by this sketch map, the elevation is 1380 feet, as shown by the contour line 1380, as reproduced from Exhibit T. Between the two points the horizontal distance is 175 feet. The difference in elevation is 73.7 feet and the angle of depression which will connect them, is 22 deg. 39 min.

Again, at a point in the northerly cross-cut from the No. 1 West Drift, in the extreme north face beyond station 876, the elevation is 1026 feet, as shown at station 876. The elevation point on the surface where a line drawn at right angles to the lime belt from this point in the north cross-cut would intercept the northerly edge of the lime belt, as shown upon sketch map No. 2, is 1400 feet. This is arrived at by taking the mean elevation between the contour lines 1380 and 1420, the point of such interception being substantially midway between those lines, and the surface station S 34 about 80 feet westerly, has an elevation of 1397.3 feet. The horizontal distance between this point at the surface and the point in the northerly cross-cut is 700 feet. The difference in elevation is 374 feet, and the angle of depression which will connect them is 28 deg. and 6 min.

It will also be noted that according to the testimony, at each of the points referred to in the United States No. 1 West Drift, the workings are still in the limestone, not yet having reached the hanging wall or boundary thereof. The angle of depression, therefore, which would connect these points at the surface above referred to with the northerly boundary of the lime belt on this west drift, would be less than that above given. How much less could not be determined, of course, until the northerly limit of the limestone on that level is reached.

This is true also of the west drift from the Ashland Tunnel.

Again, at page 28 of petitioners' brief it is said, "that the Ashland lower tunnel extends, as shown upon petitioners' Exhibit 21, to what is designated thereon as the turnsheet level and is in the limestone upon the Ashland fissure, disclosing the presence of limestone to its intersection with the West Drift of the turnsheet level, which is a distance of 480 feet. This limestone, carried to the surface to where it is disclosed at the northerly termination of the Ashland No. 2 tunnel, would bring it to the surface at the northerly side line of the Kempton Claim and some 250 feet north of where it is shown on Exhibit T."

But the elevation of the turnsheet level, as shown on petitioners' Exhibit 21, at station 419, is 1241 feet, and at the place where a line drawn from station 419 at right angles to the strike of the lode, would intercept the northerly edge of the lime belt, as shown upon the sketch map, the elevation is 1406.6 feet, as shown at station S 336 within a few feet thereof. The horizontal distance

between the two points is 280 feet. The difference in elevation 159 feet and the angle of depression which would connect the two points is 29 deg. 35 min.

Again, at page 99 of the brief, it is said: "The limestone is disclosed at the surface by workings in the Kempton Claim and in the upper Ashland Tunnel, in accordance with the projection thereof. This is shown upon petitioners' Exhibit 20 and the workings upon the Kempton Claim, noted as 'caved pit,' 'old stopes,' 'old excavation and cave' and 'strippings' on apex."

It will be noted that the "caved pit" and the "strippings" on apex in the Kempton ground, are within the limits of the lime belt as the same is shown upon respondent's Exhibit T. And the workings marked "old stopes" on petitioners' Exhibit 20, are in the limestone, as the same is shown upon Exhibit T at station 902 on petitioners' Ex. 20, and thence as the stopes are extended northerly they are beneath the surface and doubtless going down on the dip of the lime. And there is no testimony in the record to the effect that the work marked "old tunnel," "excavation" and "cave" is in the lime belt. No witness so testified. On the contrary, the chief witness for petitioners, Mr. Morehouse, at page 180, testifies that the quartzite extends downward (southerly) to near the mouth of the old Ashland Tunnel, which places it as far to the south as shown on Exhibit "T."

At pages 9 and 10 of brief for petitioners, it is said: "That about 150 feet from the west end line of the Kempton Claim, the Kempton vein is intersected by the Ashland vein. * * * And to the west of this intersection

there is found a continuation of the Kempton vein extending, as above stated, to and across the westerly end line of the Kempton Claim."

We are unable to find in the record any evidence to sustain the statement that the Kempton vein crosses the westerly end line of the claim. On the contrary, as shown in our discussion of the apex of the Kempton bedded vein, there is testimony by petitioners' own witnesses, which points with unerring certainty to the fact that this so-called vein does not cross the westerly end line of the claim, but does cross the side line thereof, running from Post 2 to 3 of the claim.

As a matter of fact, the correctness of the position of this lime belt, as shown upon respondent's Exhibit T, and as testified to by Mr. Tyler and Mr. Holden, was never questioned by petitioners, from the beginning to the close of the trial. No witness was called by them to dispute it in any particular.

Again, at pp. 9 and 10 of the brief it is said, "that the course or direction of the apex or outcrop at the surface of the Kempton is changed in its progress westerly by reason of the scoring off of the country in that immediate vicinity so that it makes an angle with the general course of the vein and of the apex up to that point substantially as is indicated by the change in direction of the side lines of the Kempton Claim, at the last course thereof, to the westerly end line. This change in direction of the side lines was made in order that the side lines should be substantially parallel to the changed direction

of the course of the apex of the vein at the surface, above set forth."

We are unable to find in the record any testimony to support this statement.

RECAPITULATION.

First.—Respondent is the owner and in the possession of the Jordan Extension, Northern Light, Grizzly and Fairview mining claims, and therefore is presumptively the owner of all of the ore bodies underlying each of these claims.

Second.—Respondent being the owner of these several claims and of the ore bodies beneath the same and in possession thereof, may maintain a bill to quiet its title thereto as against petitioners who are mere trespassers upon a portion of some of the ore bodies underlying some of these claims, but who are asserting an adverse claim or interest to all the ores underlying all of said claims.

Third.—The petitioners' asserted adverse claim or interest in and to a portion of these ore bodies is based upon a claim of extra lateral rights on their so-called Ashland fissure vein, and as to the balance thereof, their claim of ownership is based upon their alleged extra lateral rights attaching to their Kempton bed vein, so-called.

Fourth.—The burden of proof is upon the petitioners, who are seking to pass beyond the boundaries of their own claims and into territory that presumptively belongs to their neighbor, to establish to the satisfaction of the court, not only that the ore bodies in controversy lie in a vein which has its top or apex in one or the other of their

claims, but also that such claim or claims are so laid upon the course or strike of the vein or veins as will include within their extra lateral rights the ores in dispute.

Fifth.—As to the so-called Ashland fissure vein, petitioners can have no extra lateral rights thereon which would include any of the ore bodies lying underneath the surface of the Grizzly Mining Claim, because it appears from the evidence that the Ashland fissure crosses the opposite side lines of the Grizzly; that the Grizzly is an older location than the Ashland. Moreover, it appears from the undisputed evidence that the Ashland patent excludes in favor of the Northern Light all of the conflict area between it and the Northern Light, and that in turn the Northern Light patent excludes in favor of the Grizzly the conflict area between it and the Grizzly.

Sixth.—The petitioners can claim none of the ore bodies underlying the Fairview, by virtue of extra lateral rights attaching to the Ashland fissure vein, because there is absolutely no evidence to show that the ore bodies underlying the Fairview are in or belong to the so-called Ashland fissure vein.

Seventh:—The petitioners' own testimony fails to show that the so-called bed vein in the Kempton Claim entitles them to any extra lateral rights whatever:

(a) Because their testimony shows that this so-called bed vein is not such in fact, but that the ores which they seek to refer thereto, belong to and are part of a series of north and south fissure veins which cross the opposite side lines of the Kempton.

(b) Because if their so-called bed vein could be

treated as such—eliminating all of their separate and independent north and south fissure veins—still it appears from their own testimony taken as a whole, that it crosses side lines of the Kempton which are diverging in the direction of the dip.

Eighth.—Taking the evidence of the petitioners and that of respondent in rebuttal, it is demonstrated that the limestone belt, bounded by its hanging-wall and foot-wall quartzites, must be treated as one lode or vein, and that it includes all the ore bodies in controversy.

Ninth.—That the senior location upon a broad vein which includes a portion of the width of the apex is entitled to the entire vein in its course downward between planes drawn through the end lines of the location and extended indefinitely in their own direction.

Tenth.—The mere fact that a junior location which includes a portion of the width of the apex and conflicts with a senior location, which covers the remainder of the width of the apex, is allowed to go to patent without adverse claim on the part of the senior locator, does not preclude an inquiry into the question of priority.

Eleventh.—Treating the limestone belt as a lode or vein, the petitioners can assert no extralateral rights thereon, because this belt of limestone crosses lines of the Kempton which are diverging in the direction of the dip of the vein.

Here we respectfully submit the cause,

W. H. DICKSON,
GEORGE SUTHERLAND,
Solicitors for ~~Complainant~~ Respondents.

A. C. ELLIS,
A. C. ELLIS, JR.,
E. M. ALLISON,
WALDEMAR VAN COTT,
Of Counsel.

[APPENDIX]

IN THE

SUPREME COURT

OF THE

STATE OF UTAH.

JOHN R. PARK, *Respondent,*

vs.

ROBERT MORRIS WILKINSON, et al., *Appellants.*

APPELLANTS' ABSTRACT.

COMPLAINT.

(Filed June 28, 1897.)

[Title.]

Plaintiff complains of defendants and alleges:

That defendant Mima Wilkinson is the wife of said Robert Morris Wilkinson.

That the plaintiff is the owner of in fee and entitled to the possession of the following described property, to-wit:

Commencing at the southeast corner of lot nineteen, block two, Five Acre plat "A," Big Field Survey, Salt Lake County, Utah, and running thence north seventeen and four-tenths rods to the northeast corner of said lot nineteen; thence west along the north line of said lot thirty-three and eight-tenths rods to the center of Canyon

Creek; thence up the center of Canyon Creek in a general southeasterly direction to the east line of lot twenty of said block two, thence north four and one-half rods, more or less, to the place of beginning.

That said defendants unjustly claim an interest in and to said property, the exact nature of which plaintiff does not know. Said claim is a cloud upon plaintiff's title to the same.

Wherefore plaintiff demands judgment against said defendants that said defendants and each of them set up the name and nature of their claim in and to said above property, and that the Court consider the same, and adjudge the same invalid, and decree plaintiff the owner of said property in fee. That the defendants be forever barred from all claim to any estate of inheritance or freehold in said property, and for such other and further relief as is just.

ISAAC M. WADDELL,
YOUNG & MOYLE,
Attorneys for Plaintiff.

[Verification.]

ANSWER.

(Filed August 7, 1897.)

[Title.]

Now come the above named defendants, by J. D. Pardee and Goodwin & Van Pelt, their attorneys, and answer the complaint as follows:

First—That defendants deny that plaintiff is or ever was the owner in fee or otherwise of the property described in the complaint; deny that he is or ever was entitled to the possession thereof and deny that the defendants or either of them unjustly claim an interest in said property.

Second—For a second and separate defense, the defendants allege that the defendant Mima Wilkinson is now and ever since the 11th day of April, 1895, has been the owner and in possession of the property described in the complaint; that she claims to be the owner as aforesaid, as grantee of one Lorenzo Price, who at the time last above

mentioned, was the owner and in possession of the property above mentioned; that on said 11th day of April, 1895, and while the said Lorenzo Price was the owner and in possession of said real estate, he, the said Lorenzo Price, with his wife, Annie Price, duly granted and conveyed the same by a good and sufficient deed of conveyance to this defendant, Mima Wilkinson, under which deed the said Mima Wilkinson claims to be the owner thereof.

The defendant Mima Wilkinson for a cross-complaint alleges: First—That on and prior to the 11th day of April, 1895, one Lorenzo Price was the owner and in possession of the following described real estate, to-wit:

Commencing at the southeast corner of lot nineteen in block two of Five Acre Plat "A," Big Field Survey, running thence north seventeen and four-tenths rods to the northeast corner of said lot; thence west along the north boundary of said lot thirty-three and eight-tenths rods to the east bank of Canyon Creek; thence up the east bank of said creek south forty and one-half degrees east, twenty and four-tenths rods; thence up the east bank of Mill Race south fifty-one degrees, eight rods to the south boundary of said lot; thence east along the south boundary of said lot eleven and four-tenths rods to the place of beginning, together with all water rights thereto belonging or appertaining; also commencing at a point one and one-tenth rods north from the southeast corner of lot nineteen in block two of Five Acre Plat "A," Big Field Survey, running thence north eighty-seven degrees and forty-five minutes west, fourteen and three-tenths rods to the foot of the east side of Old Mill Race; thence north sixty-two degrees and fifteen minutes west, five rods; thence south three and one-half rods to the center of Canyon Creek; thence up the center of said Canyon Creek south fifty-two degrees fifteen minutes east, twelve rods to the east side of lot twenty in said block two; thence north five rods, more or less, to place of beginning, together with all water rights thereto belonging or appertaining. All of the above described real estate being in Salt Lake county.

II. That on said 11th day of April, 1895, and while

the owner and in possession thereof as aforesaid, the said Lorenzo Price, together with Annie Price, his wife, granted, bargained, sold and conveyed said real estate by a good and sufficient deed of conveyance, to this cross-complainant, Mima Wilkinson, who has ever since that time been the owner and in possession of the said real estate.

III. That the plaintiff unjustly claims the ownership of or an interest in said property, the nature of which this defendant and cross-complainant does not know, but which claim is a cloud upon this cross-complainant's title thereto.

Wherefore this defendant and cross-complainant prays judgment against the plaintiff; that he be adjudged to set forth and produce any and all claims which he may have to said real estate or any part thereof; that such claims may be adjudged and decreed to be invalid; that plaintiff be perpetually enjoined from setting up or making any claim to said premises or any part thereof; that such claim or claims be quieted and that this cross-complainant, Mima Wilkinson, be adjudged and decreed the owner and of right in possession of said real estate as against the plaintiff and that she have such other or further relief or both as may be just. Dated, August 3, 1897.

JAMES D. PARDEE AND
GOODWIN & VAN PELT,

Attorneys for Defendants and Cross-Complainant.

[Verification.]

ANSWER TO CROSS-COMPLAINT.

(Filed August 16, 1897.)

The answer to the Cross-Complaint denies the allegation of title in Lorenzo Price; the conveyance of Price to defendant Mima Wilkinson; the title and right of possession of the cross-complainant; denies that plaintiff's claim is a cloud and asserts title in plaintiff; alleges that defendants' claim is a cloud on his title and is invalid. (Verified.)

BILL OF EXCEPTIONS.
(Filed March 24, 1899.)

[Title.]

This case being called for trial and a jury sworn, plaintiff objects to the case being tried by a jury or any of the issues being referred to a jury, since the case is purely equitable and should be tried by the Court alone.

THE COURT—I fail to see anything in these pleadings for the jury to pass on; however, I will overrule the motion at this time and if there is anything appears in the evidence for the jury to determine I will let them pass on it, otherwise I will take it away from the jury.

EVIDENCE FOR PLAINTIFF.

C. V. Spencer testified:

I am acquainted with the land in dispute. This instrument shown to me is a mortgage from Wilkinson to me of a part of lots 19 and 20, block 2, in Five Acre Plat "A," Big Field Survey, Salt Lake County, and is on the east and north of Canyon Creek. The channel of the creek borders the south and west boundaries of the land. It is bounded on the east by Ninth East street. I once owned the land.

Q.—Were you ever in possession of the land?

Defendant objects as immaterial and irrelevant. Objection overruled and exception by defendant.

A.—Yes, sir.

I bought the land from Lorenzo Price, held it two or three years and sold it to Mr. Wilkinson, one of the defendants. My best recollection is that I owned the property two or three years before 1890, and was in possession during that period, during which time a Mr. Wagstaff cultivated it on shares, all of it from the street right up to the creek. No one interfered with my possession of it.

Mr. Jensen testified:

I am County Recorder of Salt Lake County and the record of deeds of this county are in my possession. I have here record book "3 S" of deeds which I have brought from the County Recorder's office. Pages 206-7 purport to show a deed from Claudius V. Spencer and Louisa King Spencer, his wife, to Robert Morris Wilkinson.

Plaintiff offers the deed in evidence. Defendant objects to it, it is not the same property described in the complaint, incompetent, irrelevant and immaterial. Overruled. Exception by defendants.

It bears date the 8th of November, 1890; the parties are as stated by me heretofore; in consideration of $6,000 the first parties grant, etc., to the party of the second part and to his heirs and assigns forever all that certain piece or parcel of land known and described as follows, to-wit: Beginning at the southeast corner of lot nineteen, block two, Five Acre Plat "A," Big Field Survey; thence north seventeen and four-tenths rods to the northeast corner of said lot; thence west along the north line of said lot thirty-three and eight-tenths rods; thence up the center of Canyon Creek in a southeasterly general direction to the east line of lot twenty in said block, thence north four and one-half rods, more or less, to the place of beginning, lying in the southwest quarter of section seventeen, township one south of range one east, Salt Lake Meridian, situated in Salt Lake County, Utah Territory; also all water and water rights belonging to said land, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging; (there follow the usual grant of all estate, claim, etc., a warranty of title, release of dower, habendum clause and covenant against incumbrances, together with signatures of the first parties and acknowledgment and signature of witness).

It was recorded November 10, 1890.

C. V. Spencer, recalled:

By the deed here in evidence, I sold the property to Mr. Wilkinson and let him in possession of the property, all of it, I presume. Mr. Wilkinson gave me a mortgage of $3,800 to secure the balance of the purchase money.

This instrument I am now shown, purports to be a mortgage given to Claudius V. Spencer from Robert Morris Wilkinson. (Identified as Exhibit "AA.")

The signature is Mr. Wilkinson's.

Plaintiff offers in evidence Exhibit "AA." Defendants object because the description in this does not correspond with the description of the property alleged in the

complaint, the mortgage is void, incompetent and irrelevant. Objection overruled, exception by defendants.

The notes secured by the mortgage were not paid. This is one of the notes and bears the signature of Mr. Wilkinson.

Note marked Exhibit "B," also the indorsement on the back, offered in evidence.

Defendants object as incompetent, irrelevant and immaterial, which objection was overruled. Exception by defendants.

I had it in mind that both notes were unpaid; I know there was one, any way.

I sold my interest in the notes to Dr. Park, and assigned the conveyance. This is the paper.

Plaintiff offers in evidence Exhibit "C."

Defendants object because it is incompetent, irrelevant and immaterial. Objection overruled and exception by defendants.

Cross-examination by Mr. Pardee:

I purchased the property from Lorenzo Price. I didn't live on the property. Wilkinson took possession under my sale to him. There was never any question of title.

Plaintiff offers in evidence the decree of foreclosure and sale, in the Third Judicial District Court of Salt Lake County, in the suit of Parks vs. Wilkinson, Exhibit "D." Defendants object because the description in the decree does not correspond with the description alleged in the complaint; one of the defendants, Mima Wilkinson, is not a party to that suit and the court had no jurisdiction over her in that suit and it is irrelevant and immaterial.

Objection overruled; exception by defendants.

Plaintiff also offers in evidence in connection with this the findings of fact and conclusions of the Court. Defendants object upon the ground that they are incompetent, irrelevant and immaterial. Objection overruled and exception by defendants.

Plaintiff offers in evidence in case No. 11869, Exhibit "E," complaint in the case of John R. Park against Wilkinson et al., filed in the Third District Court May

17, 1893, also the summons and return of the officer, default of defendants, findings of fact, decree of foreclosure, order of sale, return on the order of sale made by the sheriff.

To which defendants object on the ground of no jurisdiction over the defendant, Mima Wilkinson, in that suit, the description of the property contained in the complaint and the decree do not correspond with the description of the complaint in this case at bar, and it is incompetent and immaterial. Objection overruled and exception by defendants.

Plaintiff offers in evidence the marshal's deed, what purports to be a sale of the property, Exhibit "F," in the same case. Objection by defendants upon same ground. Objection overruled and exception by defendants.

John Park testified:

I am acquainted with the property in dispute. Mr. Wilkinson had the privilege of buying the property back after I bid it in. He seemed to carry the idea that he could redeem the property, and I said all right if it was possible for him to do so I was willing he should remain there, for a while at least, and redeem the property. This was about the time the assignment was made. I got the property about the time of the marshal's deed. Neither he nor Mrs. Wilkinson ever claimed to me that they owned the property. He has never paid any rent. I asked him to deliver me the property in 1895. He said he would vacate as soon as possible.

Q.—Who has paid the taxes on that property from 1894?

Objected to by defendants as incompetent, irrelevant and immaterial. Overruled and exception by defendants.

A.—I have.

Cross-examination by Mr. Pardee:

Mrs. Wilkinson did not ask me to pay these taxes. I paid them because I thought I owned the property. I don't know whether Mrs. Wilkinson or Mr. Wilkinson claims or is in possession of the property. I had possession; I had right enough to order him off the property. I don't

remember that my attorneys filed a petition for a writ of assistance and that the court refused to put me in possession. When I began the foreclosure there was a debt of $1,800.

I. M. Waddell testified:

I know this particular piece of land and have known it since about the time Spencer bought it from Price. Canyon Creek runs by this land. The waters from the creek come from Parley's Canyon. It cuts Twelfth South Street. Ninth East Street is on the east side of the premises in question and runs north and south. Canyon Creek cuts Ninth East east and west and when it strikes the west side of the street, it strikes the land in question and the land is on the banks of it as soon as it crosses the street. It runs from Ninth East street, where it strikes the land, in a general nort' sterly direction, right past the northwest corner——

Defendants object as irrelevant and immaterial.

THE COURT—I think they have the right to identify the land according to the deed; they have a right to take parol evidence to show where the monuments are.

The creek cuts the north line of this property. This map shows the general direction of the land and the stream.

Map identified as Exhibit "K."

I don't know whether Mrs. Wilkinson went into possession when her husband did. I have seen her on the land, some time after she went on, and again in 1895. There is a house on the land.

Cross-examination by Mr. Pardee:

I never surveyed the land, only by walking over it and taking a look at it. I don't know whether the land runs to the creek only in a general way.

Q.—Don't know only except what some one told you?

A.—No, that is all.

Q.—Just hearsay evidence; some one told you that the land ran to the creek, did they?

A.—Yes, and the examination of the abstract of title. That is all I know about it.

RE-DIRECT EXAMINATION.

Q.—Do you mean to say that it is all hearsay about where this creek crosses Twelfth South?

A.—No, sir; he is talking, I understand it now, about what I know about the length of the lines. I have been on the ground, seen the creek and know where the different owners said the lines were, and from that evidence I have testified.

RE-CROSS-EXAMINATION.

That is all I know about it, except what I gathered from the abstract. When I made the deeds I took a description of the deed, commenced at a certain place and followed it around. I didn't have any instrument and didn't measure the ground. I don't know whether the line along the north side of the land runs on the creek, only by hearsay.

Defendants moved to strike out all his evidence about the description, as hearsay.

THE COURT—His evidence regarding what he has observed, what he has seen on the creek and the streets, I cannot strike that out; the other would be disregarded as far as anything he testified to simply what some one told, would be hearsay and will not be regarded by the jury.

Lorenzo Price testified:

I lived on this land, I think, from 1880 to 1890. I bought it from Wagstaff,—a part of it from Milet—Wagstaff was in possession of his part when I bought and I was in possession when they sold to me.

Q.—What were the boundaries of the land when you took possession or at that time?

Defendants object as incompetent, irrelevant and immaterial. Objection overruled and exception by defendants.

I couldn't tell from memory. I think it is a five acre lot that bounded the land on the east. Ninth East Street runs on the east side. On the north it was bounded by the adjoining lot, owned, I believe, by Smith, at that time.

Milet joined my land on the west; there is a stream between me and Milet. A stream, the center of the creek I supposed to be the line, on the west and south.

Witness withdrawn for the time.

Mironi Iverson testified:

This book is "3 B" of deeds and comes from the County Recorder's office. It is one of the official records of this county. On page 311 there purports to be a deed between Lorenzo Price and wife to Claudius V. Spencer.

Deed offered in evidence. Defendants object on the ground that the description is not the same as the description in the complaint, is irrelevant and the description is void for uncertainty and does not describe the land so that it could be identified. Objection overruled and exception by defendants.

THE COURT—That goes to the weight; if that objection be true it is an important matter.

That deed was recorded Oct. 22, 1889, at 12 M.

In this book, book "W" of deeds, at page 734, is a deed from William Wagstaff and Joseph A. Wagstaff to Lorenzo Price.

(It is agreed that Price had a correct title.)

Lorenzo Price, recalled:

I sold this property to Spencer. I don't know whether or not he took possession. I have seen him on the place several times. I sold it for $3,500.

Plaintiff rests.

Defendants moved for a non-suit on the ground that plaintiff had not shown any title. Non-suit denied.

EVIDENCE FOR DEFENDANTS.

Mima Wilkinson testified:

I am one of the defendants. I have been in possession of this land for some time.

I have seen the deed from Price of the premises described here. It was April 11th, 1895. I have been in possession of the property ever since the deed was given to me by Price, and have been living there ever since.

Cross-examination by O. W. Moyle:

Q.—What did you give for that deed, Mrs. Wilkinson?

Defendants object as incompetent, irrelevant and immaterial, not proper cross-examination—overruled—exception by defendants.

A.—It was delivered to me, through my husband. He brought it to me. I didn't give anything for it unless he did. I have been in possession of the land over seven years. I moved there with my husband April 12, 1890. That was the time he bought from Spencer. I went in the same time he did, took possession of the whole land from the street east to the creek, I presume, farmed it, this is, my husband and I as his wife, took care of it in a general way as a homestead. I don't know whether we were living on the land at the time my husband gave the mortgage to Spencer; we bought the place several months before we moved there.

Q.—You didn't claim any title, any deed to the property, other than the deed that you got from Spencer, did you, at that time?

A.—I don't know, I was not familiar, I never saw the deeds. I was under the impression it was my home when I first went there. I was there under the Spencer deed, and I suppose whatever right I got was under that deed. I got no other title unless my husband did, and I don't know whether he did. I paid no rent to any one and claimed it as my home. I am still in possession of it under the Price deed.

Q.—Did you ever ask for this deed?

Defendants object as not proper cross-examination—overruled—exception by defendants.

A.—I was under the impression that I had the deed, the only deed—I thought it was my home. My husband had all the papers. I never asked my husband or Mr. Price for the deed. I don't know that it was ever recorded. I never authorized any one to record it. I thought it was my home from the time of the Spencer deed.

Q.—And had possession under it from that time until now, under that same deed?

Defendants object upon the same grounds as last before—overruled. Exception by defendants.

A.—Yes, sir.

Q.—That is you considered it your home before you got this deed, just as much as you considered it afterwards?

A.—I suppose so; yes, sir.

Q.—And this didn't make any difference in your title, did it?

A.—No.

Q.—Mrs. Wilkinson, do you remember the latter part of the year 1895, down on these same premises, at the time Dr. Park was present and Mr. Waddell, your husband and yourself, all were there, that Dr. Park made a demand on you and your husband for the premises, and you said nothing at all about whether or not you would give it up or whether you wouldn't; you didn't make any claim for any right that you had to it?

Defendants object as not proper cross-examination, irrelevant and immaterial, does not involve any issue in the case—overruled and exception by defendants.

A.—They were down there a number of times; don't remember this time in particular.

Q.—Do you remember any time when Dr. Park or Mr. Waddell made a demand for these premises when you were there?

Same objection—overruled and exception by defendants.

A.—They did their talking with Mr. Wilkinson. I was not present when any demand was made. I never heard them make a demand on me nor Mr. Wilkinson.

RE-DIRECT EXAMINATION.

I was in possession from 1890 up to the time I received the deed from Price, as merely being there with my family. I was claiming title myself, with my husband.

Q.—You never claimed title yourself until after you received this deed from Price, did you?

Plaintiff objects as leading and calling for a conclusion—sustained and exception by defendants.

RE-CROSS-EXAMINATION.

Q.—Mrs. Wilkinson, you told me a few moments ago

that you claimed that property there just as much before you got this last deed as after, didn't you?

A.—I told you there were other complications.

Q.—State whether or not you told me that you claimed that property just as much before as after?

A.—I felt safer when I had that deed. I don't remember how I answered. I thought it was my home and that I was more secure when I had the deed, I don't know why particularly.

Q.—But you thought you owned it just as much then as now, didn't you?

A.—Well, no, I thought I was safer, I told you, when I had that deed.

Q.—Why?

A.—Because I thought my husband had an interest in it up to the time I got that deed.

Q.—Why, didn't you know this deed was only to correct some other deeds?

A.—No, sir, I didn't.

Charles S. Wilkes, a witness for defendant, testified:

I am County Surveyor for Salt Lake County. I made a survey of these premises yesterday. I made a map showing results. This is the map. I had an abstract. I used this description and the deed of Lorenzo Price and wife to Claudius V. Spencer and from Claudius V. Spencer and wife to R. M. Wilkinson and Robert Morris Wilkinson. I commenced at the southeast corner of lot nineteen, block two, Five Acre Plat "A," then I ran north seventeen and four-tenths rods to the northeast corner of lot nineteen, which is the northeast corner of the land I was running around, then I ran west thirty-three and eight-tenths rods, there the deed—at this point, at the end of the thirty-three and eight-tenths rods I was sixty-six feet east of the center of the creek on that line that I was running. The nearest point to the center of the creek was south twenty degrees west thirty feet to the center of the creek. At this point the abstract said south forty-two degrees and forty minutes east twenty and four-tenths rods up Canyon Creek. I wasn't in the canyon creek, so I couldn't go up it without being in it very well. I run

that line up and took the topography of the creek as I went up. I didn't follow up the creek. I crossed the creek into a man's lawn. I followed the land in the creek, though, at the end of that line, and then from there south twenty-two degrees and thirty minutes east up the center of the creek three and four-tenths rods, south fifty-two degrees, fifteen minutes east seven and a half rods and north eighty-six degrees east twelve rods, to the east line of lot twenty, block two, Five Acre Plat "A;" thence north four and one-half rods to the southeast corner of nineteen, or the place of beginning.

Q.—From what you saw there did that line along the north side thirty-three and eight-tenths rods connect with anything? Could you say that description identified the land, in other words?

Plaintiff objects as incompetent, irrelevant and immaterial—a conclusion of the witness—it is for the court and jury to determine—it is not shown he is an expert in reading directions—it is expressly shown already that he does not know how to read them because of the lines he has drawn.

Objection sustained and exception by defendants.

Q.—Can you, Mr. Wilkes, from that description, tell what land was included in the description—could you identify the land?

Mr. Moyle: Q.—Mr. Wilkes, when that direction, thirty-three and eight-tenths rods, thence up the center of Canyon Creek, do you construe that means to run from this northeast corner of this lot to that creek, to the center, or only thirty-three and eight-tenths rods along the line?

A.—Thirty-three and eight-tenths rods is as much as you could run. I construe it to mean that it is that figure whether it comes to the natural object or not. It should come to the natural object, but in this case it does not. It does not reach the natural object, which is the creek, by sixty feet, or four rods.

Mr. Pardee: Could you identify the land there, or any land, from the description given?

A.—No, it could be identified in two different ways

from the description given there. You could either take the natural objects as the description or the course as the description.

Q.—From the description given you, answer the question, can you identify the particular piece of land?

A.—No, sir; I couldn't say you could.

From the end of the line that runs thirty-three and eight-tenths rods, it is sixty-six feet to the center of the creek in the same direction. You don't come to the natural object in that thirty-three rods, is the trouble. That is the objection I have to it. That is the way I construe it.

CROSS-EXAMINATION.

It says thirty-three and eight-tenths rods and thence up the creek, while it does not get you to the creek. I think the two are conflicting.

Q.—You don't know whether it is the same now as one or five years ago, or any other time?

A.—Only by the looks of the ground there from the creek.

In drawing this map, making my survey, I didn't go up the creek, but from that point I went directly south forty-three degrees and forty minutes east, and that didn't turn me up in the creek, but landed me in the creek after I had got up a little ways. It took me alongside the creek on one side and then across the creek. I didn't go up the creek twenty and four-tenths. I went on that line twenty and four-tenths. I selected that so as to lay in the creek, and from that I run one hundred and forty-eight feet and found I was in the center of the creek there. I simply made the plat correct as I found it and run the line as I found it in the abstract. I connect with the natural object all the way up. I didn't follow the natural objects. I took this course and connected with the creek all the way up, so as to see where the creek was. Taking either description, it covers this land M-Q, P-S, O, A and N, and still covers more. It includes all of the land except what we will mark here "C, D, E, and O, A, F."

Q.—So that you, or any other man, taking the description you took, could go on that land and mark it out

and would know definitely that this piece of property I referred to here, "M, Q, P, S, O, A, N," was covered by that deed, but you couldn't know certainly whether C, D, E, O, A, F was covered?

A.—No.

Q.—So that the deed then is certain enough to identify part of that land; as to the other part, the way you construe it, the deed is not certain enough to cover it?

A.—No, it does not cover a portion of it—Triangle C, D, E, and triangle O, A, F, that is, one description covers one and the other the other.

If that thirty-three and eight-tenths rods was made to go to the center of the creek, then it would be a good description.

Map offered in evidence.

Defendants offered in evidence the description given in Exhibit "I" and abstract. The description given in the deed from Price to Spencer being the one from which the witness Wilkes made his attempted survey.

R. M. Wilkinson testified:

I am one of the defendants and familiar with the ground in question. I know where the point is, thirty-three and eight-tenths rods west from the northeast corner of the lot and have measured it. Since I first became acquainted with the land, which was in 1890, the creek has changed so that it comes closer to that point recently.

CROSS-EXAMINATION.

The deed of Price to Spencer and the deed of Spencer to me were not at all the same description, one gives metes and bounds and the other gives the general course, and they didn't cover the same land at all. When I got to that point I had to stop. I couldn't get any further. The deed from Price to Spencer read "running thence north seventeen and four-tenths rods; thence west along the north boundary to said lot thirty-three and eight-tenths rods, thence up Canyon Creek," giving the metes, bounds, and distances, and the deed to me from Claudius Spencer reads "thence west along the line of said lot thirty-three and eight-tenths rods, thence up the center of Canyon

Creek in a southeasterly direction." I never cultivated this piece of land, "C, D, E," but claimed it.

Isn't it a fact that this creek was five rods wide down there at the time.

A.—No, sir, there was a mill race there where that creek was running, Mr. Smith's mill. It is not true that in the early day all that he could do was just about to drive his team up between the line "O, A," and the line of the creek. There was lots of room there. There was lots of room between the mill race and my fence there. I didn't know anything about it in 1889 when the deed from Price to Spencer was executed, only from 1890.

RE-DIRECT EXAMINATION.

When I first knew that land there was a mill race between the creek and this point that comes to the end, thirty-three and eight-tenths rods. That mill race has been obliterated since and the creek has taken it away. The man living there pressed the creek over.

Defendants offer in evidence the deed from Price to Mrs. Wilkinson, Exhibit "2."

Defendants rest.

PLAINTIFF'S REBUTTAL.

Lorenzo Price, recalled, testified:

This deed, Exhibit "L," has my signature to it. It is the deed to Mima Wilkinson.

Q.—Tell the jury how you came to give that deed.

Defendants object as incompetent, irrelevant and immaterial. Objection overruled and exception by defendants.

A.—Well, Mr. Wilkinson came to me and asked me if I would give him a quit claim deed; he thought he would have a little difficulty with the land, that's the reason, he just wanted to get a quit claim deed so that he could straighten it out, that's all.

He paid nothing for the deed. I gave it just to satisfy them. I had no interest in it and did not claim any.

I. M. Waddell testified:

I am acquainted with Mrs. Wilkinson and had a conversation in her presence with her husband in the latter

part of the year 1895. We demanded possession of the land, peaceable, or threatened if it was possible, we would bring action, and the conversation was directed to Mr. Wilkinson and Mrs. Wilkinson was present. She came out of the house. His answer was that he wouldn't refuse to give us possession and he wouldn't give us possession until he thought the thing over and seen something about it. Mrs. Wilkinson stood right alongside, had been talking with me, my wife and others she was acquainted with, at the time. She did not say anything at the time and did not make any claim to any title.

CROSS-EXAMINATION.

This conversation was shortly before we brought that petition for writ of assistance. It was east of the house.

Mr. Jenkins testified:

I have been acquainted with this property and where Canyon Creek borders on it, for about fifty years. I once owned where Wilkinson's house is.

To my knowledge this creek has been as wide as five rods, the bed of the creek. The bottom of the creek would be that wide, the stream would not only in high water. It is narrowed up now; they throw brush in it. I have been down there recently. It is very different.

CROSS-EXAMINATION.

I was down there in September last fall. The course of the creek is not changed, but the ground has been filled in on each side and made narrower. The bank on the east side is the natural bank part way.

Q.—Well, towards the north side of the lot?

A.—There is more change down a distance from the house about where my old mill stood.

I do not know exactly where the point comes to this 38.8 rods west from the road on the north side of the lot, unless I was there. I do not know how far that distance is to the creek. I do not know whether the creek washed that mill race away or not.

RE-DIRECT EXAMINATION.

I let Wagstaff have all the land up to the creek and

Wagstaff is the same man who sold to Price. I claimed and owned all the land right up to the banks of the creek.

Q.—And the description in your deed covers just as much land as you had, does it?

Objected to by defendants as irrelevant, objection overruled and exception by defendants.

A.—Yes.

Mr. Smith testified:

I owned part of this land, the south part, and am acquainted with the north part thoroughly. I remember the time when I had only room enough between that point "O, A," and the creek, to drive my horse in. I never could get up then about the length of the horse and wagon. That was in '86, '87 and '88, along there. I don't know exactly the number of years.

CROSS-EXAMINATION.

There was a mill race right in the bed of the creek. We could drive where that 38.8 point is between that and the creek about twelve, thirteen or fourteen feet— that was in '86 and '87.

Q.—You don't know anything about the land in '89 and '90, do you?

A.—'89 and '90 I had sold it back to the owner I got it from.

THE COURT—I announced during this trial, and have frequently asked the attorneys to state to the Court precisely what facts there were in this case, to submit to the jury, and in my judgment there is nothing here before this court for a jury to pass upon. It would be improper in my judgment, and it would be in violation of the procedure in such cases. The jury are not supposed to determine questionse of law, as this case, and where the issue is to remove a cloud to quiet title, necessarily there are always some questions of fact connected with these cases, to be passed upon, but they are not questions of fact that a jury pass upon, the main question in this case is a question of law, and there is nothing to submit to the jury, nothing that I can see to submit to the jury.

The Court will take the opportunity to discharge the

jury from the further consideration of this case for that reason.

The case has not shown from the pleadings or evidence that there is anything proper for a jury to consider. Therefore, gentlemen of the jury, you are excused here from further consideration of the case. It is a proper case for the Equity Court. The Court has heard the evidence and listened to the arguments.

Defendants except.

Testimony closed.

PLAINTIFF'S PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

(Filed March 24, 1899.)

[Title.]

Now, to-wit, on this 20th day of March, 1899, and within ten days from the time of the service by defendants of their proposed bill of exceptions, plaintiff in the above entitled action comes and objects to the settlement of defendants' proposed bill of exceptions, as it is now prepared, in that the said bill of exceptions does not contain all the evidence material to the alleged errors presented by the defendants in this: That none of the exhibits introduced in evidence in this action are made a part of said bill of exceptions, except by reference; and on account of said defect in said bill of exceptions, plaintiff now moves the Court that said bill of exceptions be not settled, and that the same be amended by adding thereto all of the exhibits introduced in evidence, being plaintiff's exhibits "A," "B," "C," "D," "E," "F," "K," "L," "M," and also other instruments of writing introduced in evidence, also defendants' Exhibit "I," being a map referred to in the evidence, of witness C. S. Wilkes and others. Material portions of said exhibits, with the exception of said map, are as follows, to-wit:

1. Deed from Lorenzo Price and Annie Price, his wife, to Claudius V. Spencer, dated October 21, 1889, whereby Price and wife convey by good and sufficient deed, in consideration of $3500 cash received by them, the

real estate in question by the same description as is set forth in deed partly set out on page 8 of the defendants' proposed bill of exceptions. Said deed was recorded on October 22, 1899.

2. Deed from Claudius V. Spencer and wife to one of the defendants, Robert Morris Wilkinson, whereby grantors convey to grantee by good and sufficient deed the property in question by the same description as is set forth on page 8 of the defendants' proposed bill of exceptions. Said deed is dated November 8, 1890. Said deed was recorded November 10, 1890.

3. Deed dated July 9, 1894, between United States Marshal to plaintiff, John R. Park, which said deed contains the usual and proper recitals of a Marshal's or Sheriff's deed, and conveys the property in question by the same description as is set forth on said page 8 of defendants' proposed bill of exceptions.

4. Exhibit "B," being a note secured by the mortgage introduced in evidence and contained in defendants' proposed bill of exceptions at page 12 thereof et seq.

5. "C," being a formal written assignment of said mortgage set out in defendants' bill of exceptions at page 12 et seq. thereof, also the assignment of the notes secured by said mortgage.

6. Exhibits "D" and "E," being the files in the case No. 11,869, being the case of John R. Park vs. Wilkinson et al., including the complaint, summons, and the return of the summons, showing service upon defendant Robert Morris Wilkinson and defendant Mima Wilkinson, the default of the defendants, the findings of fact, conclusions of law and decree of foreclosure; the order of sale, return of order of sale by U. S. Marshal, and certificate of sale. By which said instruments in substance it appears that suit was brought properly for foreclosure of the mortgage set forth in defendants' proposed bill of exceptions at page 12 et seq.; that John R. Park was plaintiff and that Robert Morris Wilkinson and Mima Wilkinson were defendants; that defendants were properly served with complaint and with summons to answer the complaint; and that they both defaulted in that behalf;

that the default was regularly entered, and that after evidence taken, the Court made findings of fact, conclusions of law and decree, adjudging that defendants and neither of them had any interest in or to the property in question, superior to plaintiff's mortgage, and ordered that the property in question be sold and the proceeds applied to the payment of the amount due on said note and mortgage. Said instruments further show that an order of sale issued and that after notice had been given the property in question was sold and a certificate of sale issued plaintiff, and that afterwards a deed in accordance therewith was issued from the officer making the sale to plaintiff. The description by which said property in question was described in all of said instruments and said pleadings is the same as is set forth on page 8 et seq. of defendants' proposed bill of exceptions.

7. Defendants' map, which was introduced in evidence, and which was the map used, and which must necessarily be used to explain the evidence of witness Wilkes and others.

None of said instruments or map referred to in this amendment are in the possession or control of plaintiff, and plaintiff does not know where that map is at this time.

Wherefore, said material not appearing in defendants' proposed bill of exceptions except by reference, the plaintiff hereby requests that the same be made a part of the bill of exceptions to be used upon the appeal of this case, and that as such the same be settled and allowed by the Judge of said Court and become and be a part of the record therein.

YOUNG & MOYLE,
Attorneys for Plaintiff.

EXHIBITS.

Exhibit "A." mortgage from Robert Morris Wilkinson to Claudius V. Spencer to secure two notes, one of $2000 and one of $1800, upon certain lands with the same description as set up in deed on page 8 of defendants' bill of exceptions. Recorded November 10, 1890.

Exhibit "E." Return of officer on summons in fore-

closure suit, Park vs. Wilkinson, file 11869, as to service on Mima Wilkinson, to-wit: "And I further certify that I served the within and hereunto annexed summons upon Mima Wilkinson, the within named defendant, by delivering to and leaving with Robert Morris Wilkinson, a suitable person over the age of fourteen years, at the usual place of abode of said defendant in Sugar House Ward, County of Salt Lake, on the 19th day of May, 1893, a copy of said summons attached to a certified copy of the complaint referred to in said summons.

"S. A. FENTON, U. S. Marshal.
"By JOHN R. CUMMOCK, Deputy."

STIPULATION.

All other exhibits referred to in plaintiff's proposed amendments are admitted to be substantially as set up in said proposed amendments and are hereby accepted and made part of the bill of exceptions herein. The map, defendants' Exhibit "1," was left with the court reporter and cannot now be found. (A duplicate is submitted by stipulation of parties.)

GOODWIN & VAN PELT,
Defendants' Attorneys.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed December 7, 1898.)

[Title.]

This cause coming on regularly to be heard before the Court and jury empanelled to try the case on the 29th and 30th days of November, 1898, Young & Moyle appearing as attorneys for plaintiff, and J. D. Pardee appearing as attorney for defendants, upon the complaint of plaintiff filed herein and the answer and cross-complaint of defendants filed herein, and the evidence of witnesses having been taken on behalf of plaintiff and on behalf of defendants to maintain the issues involved in this case, and the Court having requested that both plaintiff and defendants submit any special questions of fact to the jury and neither

plaintiff nor defendants having any special questions of fact to submit to the jury, the Court thereupon dismissed the jury; and the matter having been submitted to the Court for its decision, the Court now makes the following findings of fact and conclusions of law, to-wit:

1. That defendant Mima Wilkinson is the wife of defendant Robert Morris Wilkinson.

2. That each of said defendants have made their appearance in the above action and have filed their answer and cross-complaint herein.

3. That plaintiff John R. Park is the owner of in fee of the following described property, to-wit: (Here follows substantially the same description as set out in the complaint in this case.)

4. That said plaintiff acquired his ownership in fee of said property and now owns the same as such by virtue of certain conveyance of the same from one Lorenzo Price and Annie Price, his wife, to Claudius V. Spencer, dated the 21st day of October, 1889, and recorded in the county records of Salt Lake County on or about said date, and from said Claudius Spencer and wife to defendant Robert Morris Wilkinson and from defendant Robert Morris Wilkinson by virtue of a mortgage on said property given for a part purchase price of the same to said Claudius V. Spencer and afterward assigned to plaintiff John R. Park, who afterward procured foreclosure proceedings under said mortgage and a decree of foreclosure and order of sale of said property under said mortgage and afterwards by a sheriff's deed, in accordance with said sale under said decree. That plaintiff ever since then has and does now own said property in fee simple absolute.

5. That said defendant Mima Wilkinson claims a title to or interest in or to said property on account of a certain unrecorded quit claim deed from said Lorenzo Price and Annie Price, his wife, to defendant Mima Wilkinson, in words and figures following, to-wit:

QUIT CLAIM DEED.

Lorenzo Price and Annie Price, his wife, grantors, of the City and County of Salt Lake, Utah Territory, hereby quit claim to Mima Wilkinson, grantee, of Salt Lake County, for the sum of One Dollar, the following described tracts of land in Salt Lake County, Territory of Utah: (Here follows substantially the same description set out in the cross-complaint in this action.)

This deed is given to correct description of deed given October 21, 1889, recorded in "3 B" Deeds, page 311. Also deed given November 8, 1890, recorded in "S" of Deeds, page 206.

Witness the hands of said grantors this 11th day of April, A. D. 1895.

LORENZO PRICE,
ANNIE PRICE.

Signed in the presence of J. N. Courtney.
(Acknowledgment.)

6. That said deed above set forth was given for the purpose of correcting certain irregularities in plaintiff's title in and to said property above described and for no other reason, and was given without consideration. At the time the same was given said Lorenzo Price and Annie Price, or either of them did not own, neither did they claim any right, title, claim or interest in or to said property or any part thereof; and that said deed above set forth is void and of no effect, and is a cloud upon plaintiff's title.

7. That said defendants or either of them did not own any right, title, claim or interest in or to said property or any part thereof.

8. That said defendant Mima Wilkinson is not now and has not since the 11th day of April, 1895, been the owner of the property above described and in plaintiff's complaint described, or at any other time; and that said Lorenzo Price, mentioned in defendants' answer herein, was not on the 11th day of April, 1895, and at no time since said date has been or claimed to be the owner of or in possession of the property above mentioned, or any part

thereof; and that when said alleged deed above set forth was executed, said Lorenzo Price was not the owner of and was not in the possession of said real property above described, or any part thereof, and said Lorenzo Price has not been in the possession of or claim the possession of said property at any time since he sold and conveyed the same to Claudius V. Spencer as aforesaid. That said Lorenzo Price was not on the 11th day of April, 1895, the owner of or in possession of said property, or any part thereof and had at no time since the time of said conveyance of said property to said Claudius V. Spencer by said Lorenzo Price been the owner of or in the possession of or claiming the ownership or the possession of said property, or any part thereof.

9. That said defendant Mima Wilkinson has at no time whatever owned said property, or any part thereof; and that each and all of said claims of said defendants and each of them to the ownership of said property, and every part thereof, is unjust and unlawful, and are clouds upon plaintiff's title.

CONCLUSIONS OF LAW.

From the foregoing facts the Court finds:

That plaintiff is the owner of said property above described and every part or parcel thereof.

That defendant Robert Morris Wilkinson owns no right, title, claim or interest in or to said property, or any part or parcel thereof, and does not own the same, or any part or parcel thereof.

That said defendant Mima Wilkinson owns no right, title, claim or interest in or to said property or any part thereof.

That said deed set forth in the findings and under which said defendant Mima Wilkinson claims, is void and of no effect whatever, and is a cloud upon plaintiff's title, and the plaintiff is entitled to a decree declaring said deed null and void, and quieting his title thereto as against said deed and as against all claims in favor of said defendants or either of them, and to his costs in this case ex-

pended; and it is ordered that a decree be made in accordance therewith.

A. N. CHERRY,
Judge.

Dated, December 3, 1898.
Attest: DAVID C. DUNBAR, Clerk.
By F. W. LITTLE, Deputy.

DECREE.

(Filed December 10, 1898.)

[Title.]

This cause having been regularly called and tried before the Court upon the complaint of plaintiff and the answer and cross-complaint of defendants and the answer of plaintiff to defendants' cross-complaint, and the Court having made and filed its findings of fact and conclusions of law, wherein judgment was awarded in favor of the plaintiff and against defendants and each of them, and having ordered that a decree be entered in accordance therewith;

It is now therefore hereby ordered, adjudged and decreed: That plaintiff have judgment as prayed for in his complaint herein against the defendants and each of them.

That the deed set forth in the findings above mentioned is void and is a cloud upon plaintiff's title.

That all adverse claims of said defendants, and each of them, and all persons claiming or to claim said premises or any part thereof through or under said defendants or either of them, are hereby ordered and adjudged and decreed to be invalid and groundless; and that plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land in said complaint and hereinafter described, and every part and parcel thereof, and his title thereto is hereby adjudged to be quieted against all claims, demands, or pretentions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof.

Said premises are bounded and described as follows, to-wit: Commencing at the southeast corner of lot nine-

teen (19) in block two (2), Five Acre Plat "A," Big Field Survey, Salt Lake County, Utah; and running thence north seventeen and four-tenths (17.4) rods to the northeast corner of said lot nineteen (19); thence west along the north line of said lot thirty-three and eight-tenths (33.8) rods, more or less, to the center of Canyon Creek; thence up the center of Canyon Creek in a general southeasterly direction to the east line of lot twenty (20) of said block two (2); thence north four and one-half (4½) rods, more or less, to the place of beginning, together with all water rights thereunto belonging or in any wise appertaining.

It is hereby further ordered, adjudged and decreed that plaintiff have and recover his costs herein, hereby taxed at ———

A. N. Cherry, Judge.

Dated December 7th, 1898.
Attest: David C. Dunbar, Clerk.
By F. W. Little, Deputy.

CERTIFICATE.

(Filed March 24, 1899.)

And afterwards on the 10th day of March, 1899, and within the time limited by law and the orders of this Court, the said defendants prepared and served on the attorneys for the plaintiff this bill of exceptions and because the said matters and things hereinbefore set forth do not appear of record in said cause I have, at the request of said defendants, made, settled and signed this bill of exceptions that the same may become and be a part of the record herein, this 24th day of March, A. D 1899.

A. N. Cherry, Judge.

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

(Filed May 2, 1899.)

[Title.]

Thereafter and within the time allowed by law and order of said Court, the defendats duly served and filed

their notice of intention to move for a new trial upon the following grounds, to-wit:

First—Insufficiency of the evidence to justify the decision, and that it is against law.

Second—Errors in law occurring at the trial and excepted to by the defendants.

Particulars in which the evidence is insufficient to justify the decision.

First—The evidence fails to show that any property was mortgaged by the pretended mortgage from Robert Morris Wilkinson to Claudius V. Spencer under which the plaintiff claims; the attempted description does not appear to inclose any property by metes and bounds or otherwise and is void for uncertainty.

Second—There is no oral testimony in aid of the insufficient description in the mortgage under which plaintiff claims to show that the metes and bounds set out in said mortgage inclose or describe any property so that the same may be identified, but on the contrary established affirmatively that the metes and bounds set out in the mortgage do not inclose or describe any property so that the same may be identified.

Third—The evidence wholly fails to sustain the allegations of the complaint as to the description of the land claimed by plaintiff.

The specification of errors upon which the defendants rely which were set out in the notice of intention to move for a new trial, are hereinafter set out in the petition in error filed herein.

MOTION FOR NEW TRIAL.

(Filed May 2, 1899.)

The motion for a new trial based upon the minutes of the Court including the bill of exceptions and upon all the records and files of said action, and upon the order of the Court enlarging and extending the time therefor, having been presented to the Court, after argument of counsel, was on the 3rd day of June, 1899, overruled and denied.

Clerk's certificate to transcript in usual form.

IN THE SUPREME COURT OF THE STATE OF UTAH.

JOHN R. PARK,
Respondent,
vs.
ROBERT MORRIS WILKINSON AND MIMA WILKINSON,
Appellants.

The above named appellants petition to this Court that the appeal of this action be tried upon the errors assigned as follows, to-wit:

PARTICULARS IN WHICH THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE DECISION.

First—The evidence fails to show that any property was mortgaged by the pretended mortgage from Robert Morris Wilkinson to Claudius V. Spencer, under which plaintiff claims; the attempted description does not appear to inclose any property by metes and bounds or otherwise and is void for uncertainty.

Second—There is no oral testimony in aid of the insufficient description in the mortgage under which plaintiff claims, to show that the metes and bounds set out in said mortgage inclose or describe any property so that the same may be identified, but on the contrary establishes affirmatively that the metes and bounds set out in the mortgage do not inclose or describe any property so that the same may be identified.

Third—The evidence wholly fails to sustain the allegations of the complaint as to the description of the land claimed by plaintiff.

ERRORS OF LAW OCCURRING AT THE TRIAL.

1. The Court erred in discharging the jury and in finding the issues herein by itself without a jury.

2. The Court erred in receiving plaintiff's exhibit "AA," being the mortgage, and in overruling the defendants objection thereto.

3. The Court erred in receiving in evidence plaintiff's exhibit "C" and in overruling the defendants objection thereto.

4. The Court erred in receiving in evidence plaintiff's exhibit "D," being the decree of foreclosure entered in the Third Judicial District Court, Salt Lake County, in the suit of Park vs. Wilkinson and in overruling the defendants objection thereto.

5. The Court erred in receiving in evidence the Findings of Fact and Conclusions of Law in the case last above referred to and in overraling the defendants objection thereto.

6. The Court erred in denying the defendants motion for a non-suit at the close of plaintiff's testimony.

7. The Court erred in overruling the objection of the defendants to the introduction in evidence of the deed from Claudius V. Spencer and Eliza B. Spencer, his wife, to Robert Morris Wilkinson.

8. The Court erred in overruling the defendants objection to the following question put to the witness Lorenzo Price: "Q.—What were the boundaries of the land you took possession of at that time?" And in overruling the defendants objection thereto.

9. The Court erred in overruling defendants' objection to plaintiff's exhibit "M" and in overruling the objection thereto and in admitting the same in evidence over said objection.

10. The Court erred in overruling defendants' objection to the following question put to witness Lorenzo Price: "Q.—What did Mr. Wilkinson say, if anything, about why the deed was taken to Mrs. Wilkinson?" and in permitting the witness to answer the said question.

11. The Court erred in making the third finding of fact for the reason that there is no evidence whatever in said cause showing that the plaintiff was the owner of the premises described therein and described in the complaint.

12. The Court erred in making the sixth finding of fact for the alleged reason that there was no evidence in the cause showing or tending to show that the said Lorenzo

Price nor Annie Price had any title to the land in controversy at the time the deed was made to defendants.

13. The Court erred in making and entering the decree in said cause for the reason that it is not supported by the Findings of Fact.

14. The Court erred in making its 1st Conclusion of Law for the reason that it is not supported by the facts found.

15. The Court erred in making its 2nd Conclusion of Law for the reason that it is not supported by the facts found.

GOODWIN & VAN PELT,
Attorneys for Appellants.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, do hereby certify that the foregoing appendix, consisting of pages 1 to 33, inclusive, is a full, true and correct copy of the record on appeal to said Supreme Court, in the case of John R. Park, Respondent, vs. Robert Morris Wilkinson, et al., Appellants, on file in the office of the Clerk of said Supreme Court, and in my custody as such clerk.

Witness my hand and the seal of the Supreme Court of the State of Utah, this 28th day of December 1906.

H. W. Griffith
Clerk.
By Thos. J. Wells
Deputy

FILED
APR 21 1906
JAMES H. McKENNEY
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]2

LEONIDAS M. LAWSON, WILLIAM J. HARVEY, EDWARD BALBACH, JR., ENOS A. WALL, HEBER M. WELLS, THOMAS KEARNS, JUNIUS F. WELLS, AND THE IVANHOE MINING COMPANY, A CORPORATION,
Petitioners,

vs.

THE UNITED STATES MINING COMPANY, A CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

OGDEN HILES,
CHARLES C. DEY,
CHARLES J. HUGHES, JR.,
Attorneys for Petitioners.

THE SMITH-BROOKS PRESS, DENVER.

SYNOPSIS OF BRIEF.

		Page.
	Preliminary Statement	1
	Pleadings and Proceedings and Claims of Parties	2
	Demurrer to Bill	5
	Substance of Amended Answer, Motion to Dismiss Bill or retaining it, to require respondent to plead issues at law	6
	Motion to Dismiss, or for submission of issues to jury	11
II.	Final Decree in the Circuit Court	13
III.	Respondent's Case in Chief	14
IV.	Defendant's Case	14
	Kempton Vein; Outcrop; Strike; Dip	15
	Ashland Vein; Outcrop; Apex; Strike; Dip	21
	Respondent's Admissions	22
V.	Respondent's Rebuttal	25
	Jordan Location Certificate	26
	Mountain Gem Location Certificate	26
	Jordan Patent Plat, Mountain Gem Patent Plat	27
VI.	Generalized Statement of the Testimony of the Petitioner in sur-rebuttal concerning the non-discovery and non-development of ore in the Gem claim	29
VII.	Specification of Errors	33

Page.

VIII. Argument 37

2. Granting Words of Patents..... 41

3. Words of Exception in Jordan and Gem Patents 42

4. Doctrine of Relation not Applicable..... 44

5. The Senior Kempton and Ashland Patents conclusively prove and determine the priority of discovery and location of these claims over all overlapping and conflicting claims, and specifically the Jordan and Mountain Gem claims.... 57

6. Decisions of subordinate courts of the country in harmony with doctrine of this court, in Lavagnino vs. Uhlig, concerning conclusiveness of proceedings in Land Department, whereby patent to mining lode claim is issued; and in accord with understanding and interests of those engaged in mining industry 73

7. Proceedings in Land Department for Patent—effect of 74

8. Opinion of Circuit Court of Appeals, concerning nature and effect of patent proceedings in Land Department whereby patent to mining lode claim is issued, considered 79

10. Party relying on Deed containing exception must plead himself without the exception 92

11. The claim of respondent is, and the Circuit Court of Appeals held, that the prior locator has exclusive right of lateral pursuit on a broad lode, although only a portion of the width of the apex is within the claim 93

Page.

12. Misunderstandings and misconceptions of the facts by the Circuit Court of Appeals, and incorrect presentations thereof in the maps introduced in evidence at the trial by the respondent... 94

13. Alleged Broad Lode 120

A.—A finding of the Circuit Court should have bound and concluded the Circuit Court of Appeals upon the question of the existence of the alleged broad lode, and also the question of the existence of the Ashland and Kempton veins, since the determination of that court was based upon conflicting testimony, heard orally in open court by the judge presiding at the trial..... 122

B.—The limestone belt does not constitute a mineral bearing lode. It is not a lode in fact within the provisions of the United States Statute, or within any reasonable construction which can be placed thereon. The ore bodies in conflict are not portions of the alleged broad lode, but are ore bodies which are parts of the Ashland Fissure and Kempton bedded vein, having their apexes within the Ashland and Kempton claims 136

C.—The Ashland Fissure Lode..... 166

14. Conclusion on Argument concerning lodes. 173

15. Bill fatally defective because on its face an ejectment bill 174

16. Right of trial by jury in suits to quiet title under section 3511 Revised Statutes of Utah, 1898 177

Page.

17. This is nominally a suit in equity, but actually an action at common law, in meaning of Seventh Amendment to Constitution 184

18. All other questions apart, it is the duty of court to dismiss bill *sua sponte*, agreeably to rule established by this court in Hipp vs. Babin; Parker vs. Winnepiseogee; Lewis vs. Cocks, and other decisions of this court. Pleadings and evidence which show that the petitioners were in actual possession and immediate occupation of disputed part of lode at time of the filing of the bill... 184

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 264.

LEONIDAS M. LAWSON, WILLIAM J. HARVEY, EDWARD BALBACH, JR., ENOS A. WALL, HEBER M. WELLS, THOMAS KEARNS, JUNIUS F. WELLS, AND THE IVANHOE MINING COMPANY, A CORPORATION,
Petitioners,

vs.

THE UNITED STATES MINING COMPANY, A CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

STATEMENT.

This suit was tried in the United States Circuit Court for Utah, upon an amended complaint, answer thereto, and replication. The amended bill was filed June 2, 1902. The trial was had before Honorable John A. Riner, United States district judge, before whom the testimony, by consent of the parties, was introduced orally, so that he heard the case just as he would have heard a jury case submitted for trial to the court without the intervention of a jury. The trial began on the 20th of October, 1902, and

the taking of testimony was concluded on the 27th of October, 1902. The case was thereupon argued and the decision of Judge Riner was filed on March 23, 1903. The decree was for the complainant, upon a motion made by the defendants to dismiss the bill or to require the complainant to commence an action at law to determine the ownership of the ores or veins in dispute, but upon the merits the decree was entered for the defendants, dismissing the complainant's bill at its costs. The case was then taken by the complainant on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, in which court an oral argument was had, which was concluded on September 19, 1903. On the 23d day of November, A. D. 1904, an opinion was filed in the Circuit Court of Appeals, rendered by Judge Vandeventer, reversing the decree on the merits, entered by Judge Riner in the Circuit Court, and a mandate issued with direction to enter a decree for the complainant in conformity with the prayer of the bill of complaint. On the 23d day of December, 1904, a petition for rehearing was filed, which was overruled on March 7, 1905. Thereupon, on May 13, 1905, a petition for certiorari was filed in this court, the certiorari was issued on the 17th of October, 1905, and the certiorari and return were filed in this court October 31, 1905. So that this cause is now pending in this court upon certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review the decree of that court.

PLEADINGS AND PROCEEDINGS AND CLAIMS OF PARTIES.

In the month of June, 1902, respondent filed its amended bill of complaint in the United States Circuit Court for the District of Utah, against the above named petitioners, except The Ivanhoe Mining Company, to quiet the alleged title of the complainant to four certain lode mining claims, situated in the West Mountain mining district, Salt Lake county, Utah, called the Jordan Extension, the Northern Light, the Grizzly and the Fairview claims, and to all the ores and metalliferous rock existing and found

vertically beneath the surfaces thereof. The jurisdiction of the court was based upon the diversity of citizenship of the parties complainant and defendant. The amended bill alleged, in substance, that the respondent was the owner, in possession and entitled to the possession of the above named claims and of all the metalliferous ores existing in and found vertically beneath the surface thereof, and that these ores were of great value, to wit, of the value of more than ten thousand dollars. (Paragraph 6, Amended Bill, Record, pages 3, 4.) The bill alleges that the defendants, "by means of secret underground works, drifts, excavations and openings, commencing at a long distance on the surface from said mining claims, and to which your orator had no access, without the knowledge or consent of your orator, *entered in and upon* said Jordan Extension mining claim, the Northern Light mining claim and the Grizzly mining claim, and beneath the surface thereof have mined, extracted and removed and converted to their own use, large quantities of valuable ores and mineral therefrom, the property of your orator. (Paragraph 7, Amended Bill, Record, page 4.) That the ores thus referred to, as being underneath the said Jordan Extension, Northern Light and Grizzly mining claims, are in a certain lode which has its apex in two other mining claims belonging to the respondent, to wit, the Old Jordan mining claim, U. S. Lot 61, and the Mountain Gem mining claim, U. S. Lot 75, which lie to the south of the Jordan Extension, Northern Light, Grizzly and Fairview claims above mentioned, and that the petitioners herein, defendants in that suit, pretend and assert that the ores so found are contained in a vein or lode which has its apex in the Kempton mining claim, U. S. Lot No. 55, but that such assertion is false, and that if there is any mineral, vein or lode in the Kempton mining claim dipping or in any wise extending to or under the Jordan Extension mining claim, the Northern Light mining claim, the Grizzly mining claim and the Fairview mining claim, or either of them, that such lode or vein does not have an apex in the Kempton mining claim, or belong thereto, or in any wise form a part thereof, but that the same is a part of and belongs to the Old Jordan and Mountain Gem lodes above described, the property of the complainant, which lodes in their dip and between pro-

tractions in their own direction of the parallel surface end lines of said claims, pass across and beneath their side lines, and extending beneath the surface of the Kempton mining claim, enter into and beneath the surface of the Old Jordan Extension mining claim, and that ores found beneath the last named claim in said lodes are the same the defendants wrongfully pretend are in or belong to a lode or lodes in the Kempton mining claim, and not otherwise. In effect, that the defendants claim the ownership of the ore in controversy as being within a lode having its outcrop or apex within the surface boundaries of the Kempton lode mining claim, which was the property of the defendants, and that this vein extended under the territory in controversy in such manner as to give the ownership of this ore to the defendants, but that the complainant asserted that these ores, beneath the surface of the said claims described, belonged to the complainant, because the apex of the lodes in which they were found was contained within the surface boundaries of the Mountain Gem and Jordan lode mining claims. (Paragraph 9, Amended Bill, Record, pages 5, 6, 7.)

Complainant in its amended bill asks:

"That they (the defendants) and each of them, be required to set forth any and every adverse interest, claim or demand in or to said above described premises, and the ores and minerals therein contained, to the end that the same may be justly adjudicated and declared null and void as against your orator, and that the title and ownership of your orator in and to said Jordan Extension mining claim, the Northern Light mining claim, the Grizzly mining claim, and the Fairview mining claim, and the ores and minerals contained therein vertically beneath the surface boundaries thereof, be established and confirmed as against any and all claims of the said defendants, or either or any of them, and all cloud thereon forever removed." (Paragraph II of Prayer of Amended Bill, Record, page 7.)

And finally, the prayer of the said bill of complaint is:

"That said defendants, and each of them, be restrained from the commission of any of the acts or doings hereby sought to be enjoined pending such hearing, and upon such hearing that they and

each of them be forever enjoined and restrained from asserting any claim whatsoever in and to said premises and the ores and minerals therein contained, and from working in or upon or beneath the surface of said Jordan Extension mining claim, the Northern Light mining claim, the Grizzly mining claim, and the Fairview mining claim, or either of them, or doing any act or thing adverse to the title and ownership of your orator in and to said premises, and the ores and minerals therein contained, and for such other and further relief as the equity of the case may require." (Paragraph IV, Prayer Amended Bill, Record, page 8.)

DEMURRER TO BILL.

The defendants demurred to the bill for want of equity and for lack of jurisdiction in the court to entertain or try the same, for that it appeared on its face that the dispute concerned the legal estate, title and right to possession of the lode and premises in controversy, and that the complainant had an adequate remedy at law for the alleged wrongs and injuries complained of, and that it appeared on the face of the bill that there was an entire omission to allege that complainant's asserted title and right to possession of the alleged lode and premises had been previously established at law, nor did it allege that any action at law was pending to establish such alleged title, and no impediment was alleged or shown to exist to an action at law being brought to establish complainant's alleged legal estate, title and right to the possession of the said lode and premises in controversy. (Record, pages 9, 10.)

The demurrer was overruled by the court, and thereupon the defendants, except the Ivanhoe Mining Company, answered the bill, and thereafter, by consent of the complainant, the Ivanhoe Mining Company appeared in the action as a party defendant, and thereupon all the defendants, by leave, filed their amended answer. (Record, page 24.)

SUBSTANCE OF AMENDED ANSWER. MOTION TO DISMISS BILL, OR RETAINING IT, TO REQUIRE RESPONDENT TO PLEAD ISSUES AT LAW.

The defendants, in their amended answer, denied all the material allegations of the bill, and averred affirmatively that they were the owners, in possession and entitled to the possession of the Kempton lode mining claim, U. S. Lot 55, and that the same had theretofore, for more than twenty-five years before the commencement of this suit, been continuously possessed, occupied, mined and worked by the defendants and their grantors, predecessors in interest therein, on its dip beyond the northerly side line of the said Kempton claim and beneath the surface of the alleged Jordan Extension, Northern Light, Grizzly and Fairview claims, in and upon a lode having its top or apex within the surface boundaries of the Kempton lode mining claim, and belonging thereto as a part of a grant contained in a patent therefor from the United States; that there existed and was found, within the exterior surface boundaries of said Kempton claim, a large lode or vein of mineral and metal bearing ores, earth and rock in place, containing gold, silver, lead, copper and other metals, and which had its top or apex and outcrop wholly within the exterior boundaries of that claim, and which lode or vein had its course or strike in an easterly and westerly direction, parallel to and coincident, or nearly so, with the side lines of the said Kempton claim. (Paragraphs 7, 14, 15, Amended Answer, Record, pages 26-30.)

The answer further averred that the defendants and their predecessors in title to said Kempton mining claim had mined and traced the said lode or vein, from its top or apex and outcrop within said Kempton claim, on its dip beneath the adjoining surface ground beyond a vertical plane extended downward through the northerly side line of the claim, to a depth of as much as 350 feet; that by the terms of the said United States patent granting said mining claim to the predecessors in title of the defendants, the defendants were entitled to the whole of said lode or vein on its said dip, throughout its entire depth, within protractions of

the end lines of the Kempton claim underneath the aforesaid surface ground, and to all the minerals and metalliferous ore, earth and rock therein contained. (Record, pages 30, 31.) That if any vein or lode existed or was found in the Old Jordan or Mountain Gem claims, it was a different vein from that found in the Kempton claim, and that the assertions of the complainant, that it was the owner of or entitled to the possession of the lode or vein which apexes in the Kempton ground, were false and fictitious, and well known by the complainant so to be, and were without any foundation of right whatever, and that the complainant had no right, interest, estate, title or right of possession in or to the Kempton mine, vein or lode, or to any of the ores, minerals or metals therein contained. (Record, page 31.)

So that by the amended answer the defendants allege their ownership of the Kempton lode mining claim, the existence therein of a large and well defined vein, having its outcrop and apex entirely within the surface boundaries of said Kempton claim, which upon its dip and descent into the earth passes beyond a plane extended vertically downward through the northerly side line of said claim into and under the premises in controversy, and that by virtue of the ownership of this claim and the apex of said vein, the defendants were the owners of, in, and entitled to the possession of the ores in controversy.

The defendants in their said amended answer further alleged that the defendant, The Ivanhoe Mining Company, was the owner, by virtue of a patent of the United States therefor, of the Ashland lode mining claim, U. S. Lot No. 67, issued to the predecessors in interest of the said Ivanhoe Mining Company, on the 27th day of September, 1875, and that within the said Ashland lode mining claim there was a large lode or vein of mineral and metal bearing ores, earth and rock in place, containing gold, silver, copper, lead and other metals, which existed and were found throughout more than nine hundred feet in length of said Ashland lode mining claim and location; that the said lode or vein in its strike passed through the southwesterly end line thereof and had its top or apex within the side lines of said claim, and that the general course or strike of said lode was nearly or quite parallel to the

side lines of said claim, and that said Ivanhoe Mining Company and its said lessee, Wall, defendants herein, were entitled, under the provisions of the patent granting the Ashland lode mining claim to the predecessors in title of said Ivanhoe Mining Company, to the whole of said vein or lode on its dip beyond the side lines of said claim, throughout its entire depth, within the limits of the protraction of the end lines as aforesaid of said Ashland lode mining claim, and all the metals and minerals and metal-bearing ores, earth and rock therein contained; that the said vein or lode, on its descent into the earth, departed from a perpendicular and had an inclination or dip from the horizon of about 70 degrees in a northwesterly direction, and in its said dip passed out of and beyond the northwesterly vertical side line of said Ashland mining claim and premises, so that it passed underneath adjoining surface ground, but within protractions of the end lines of said Ashland claim on the surface extended downward vertically and so continued in their own direction that they include a part of said lode under the adjoining surface ground, known as and called the Grizzly claim, the Northern Light claim and the Fairview claim. (Paragraphs 2 and 3, Amended Answer of Ivanhoe Mining Company, Record, pages 32, 33.)

The answer contains averments showing that the vein described as apexing within the surface boundaries of the Ashland lode mining claim was the property of the said defendant, The Ivanhoe Mining Company, and of its lessee, the defendant Wall, and that by virtue of the ownership and lease upon the Ashland lode mining claim, these defendants had a right to follow said vein into the premises in controversy, the ownership of which was asserted by the said complainant, and that portions of the ores therein found were contained within the said lode belonging to said defendants, as a vein having its outcrop within the surface boundaries of the Ashland lode mining claim.

The contention of the defendants was and is that there was found within the Kempton lode mining claim a vein therein outcropping, which is called in the testimony generally a bedded, or the bedded vein, which occurred in or connected with a fissure, extending in substantial conformity with and upon virtually the same dip as the bedding planes of the limestone through which it

first descends in its dip or descent into the earth, and which said limestone constitutes the walls or country rock surrounding and enclosing said bedded vein; that the dip of this bedded vein was substantially 35 or 40 degrees from the horizon to the northwest; that the extent upon the strike of this lode or vein at its apex or outcrop at the surface, was about 500 feet in length, in an easterly and westerly direction, terminating in its easterly course against a north and south cross-fissure, so that it abutted at its easterly end against a face of barren country limestone; that in its westerly course it terminated at a point about 500 feet from this easterly termination thereof, so far as the workings disclosed, so that no tracing or further extent of it in that direction was disclosed by actual workings at the surface.

The failure to ascertain, disclose and further demonstrate the course and position of said vein in its easterly course at the surface, so far as the same extended, was prevented by the formation and condition of the surface in a cross gulch or depression at the distance of about 500 feet from the easterly termination thereof, but said vein is by underground workings traced in its westerly course to within sixty feet of the westerly end line of said Kempton lode mining claim, there having a course and dip which would carry it directly across said end line, and upon being carried to the surface would be throughout said sixty feet and to the point where it crossed said end line within the surface side lines of said Kempton claim.

That about 150 feet from the west end line of the Kempton claim the Kempton vein is intersected by the Ashland vein, as shown upon the west drift from the upper Ashland tunnel, and to the west of this intersection there is found a continuation of the bedded or Kempton vein, extending, as above stated, to and across the westerly end line of said Kempton claim, as above stated. The course or direction of the apex or outcrop at the surface of the Kempton vein is changed, in its progress westerly, by reason of the scoring off of the country in that immediate vicinity, so that it makes an angle with the general course of the vein, and of the apex up to that point, substantially as is indicated by the change in direction of the side lines of the Kempton claim, at the last course thereof, to the westerly end line. This

change in direction of the side lines was made in order that the side lines should be substantially parallel to the changed direction of the course of the apex of the vein at the surface, above set forth.

It was and is further claimed by the defendants that the Ashland lode and vein at its apex or outcrop in its course crosses the southerly end line of said Ashland claim, and extends northerly within the surface lines of said claim a distance, as disclosed by workings, of more than 900 feet, at which distance the apex is no further discernible or disclosed at or near the surface, but by the direction and dip of the vein, and the location of the apex so far as traced, it appears that it extended thence northerly through the northerly end line of said claim, so that the apex of the said Ashland vein extends, either as demonstrated by actual workings or by the necessary inferences from its position, between the side lines of said claim and across both of the end lines thereof, and that it thence dips upon its descent into the earth in a westerly direction, at an angle of about 70 degrees from the horizon, underneath the surface of the Grizzly, the Northern Light and Fairview claims, and that beneath the surface of said Northern Light and Grizzly claims, at about a level known in the evidence as the "turn-sheet" level, the said Ashland and Kempton lodes, to the extent of the said Kempton to the easterly termination thereof, unite and are one thence in their descent into the earth to the extent of the said Kempton, which upon the strike is less than the extent of the said Ashland claim, and that the ores in said lodes have a common origin. The country rock through which these veins pass consists of bands and layers or strata of limestone and quartzite, with occasional intrusions of sheets of porphyry, which said limestone and quartzite strata have a general easterly and westerly direction and dip to the north, at substantially an angle of 30 degrees from the horizon; that the highest layer of this rock within the surface of the Kempton and Ashland claims is quartzite, underlaid by a belt of limestone, which is in turn underlaid by a belt of quartzite, and thus the limestone and the quartzite layers alternate throughout this mining district.

The defendants in their answers prayed that the complainant's bill should be dismissed, and that they should have judg-

ment for costs. (Record, page 34.) To these answers the complainant filed the general replication, and the cause was thereupon set down for trial on the 20th day of October, A. D. 1902, and then came on for trial in the Circuit Court, on the issues joined by bill, answer and replication, before the Honorable John A. Riner, who sat by the consent of the parties to hear the evidence to be adduced in open court. Before any evidence was introduced, the defendants were allowed to have entered upon the record the following objection or suggestion:

"Mr. Hiles: I wish at this point to state an objection. The bill of complaint filed in this case we assert is an ejectment bill. At the proper time I wish to make a motion to dismiss it, on the ground that there are issues at law which ought to be tried by jury, and we shall then present the reasons which we think will result in an order for the dismissal of the case." (Record, page 39.)

MOTION TO DISMISS OR FOR SUBMISSION OF ISSUES TO JURY.

The trial proceeded, and when the complainant had rested its case in chief, and it appeared from the evidence introduced by it that the defendants were in the actual possession and immediate occupation of the mines, veins, ores and lodes in controversy, and as was so especially shown by the testimony of complainant's witnesses J. Fewson Smith and A. F. Holden (Record, pages 84-97), the defendants made the following motion, which was entered in the minutes of the court:

"The defendants now come and move the court to dismiss the amended bill of complaint in this case, to enter an order directing that plaintiff be required to plead the facts which involve the law issues in this case, which appear upon the face of the amended bill, and now in the evidence which has been elicited in support of it. This motion is made upon the grounds:

"First: That it appears by the said amended bill that the defendants were at the time of the commencement of the action, and at the time of filing said amended bill, and are now, in possession of the land and lode mentioned in said amended bill

of complaint, from the surface of the earth in Kempton and Ashland ground on its dip under the adjacent alleged mining claims called the Jordan Extension, Northern Light, Grizzly and Fairview claims.

"Second: That it appears from the evidence which has been elicited by complainant in support of its said amended complaint, that the defendants were, at the time of the commencement of this action and at the time of filing said amended bill, and are now, in possession of the mine and lode mentioned in said amended bill of complaint, upon the surface of the earth in Kempton and Ashland ground, on its dip under adjacent alleged mining claims called the Jordan Extension, Northern Light, Grizzly and Fairview claims.

"And the defendants now come and pray for an order of the court for, and they hereby insist upon and demand, a trial by jury of the question of their right of possession of said mine and lode so as aforesaid shown by complainant's evidence to be and to have been at the time of the commencement of this action in the possession of the defendants." (Record, pages 105-106.)

The court took this motion under advisement, and the trial of the cause proceeded without a jury, and the respective parties introduced evidence to prove the issues presented by them. In the trial the rule, which required the testimony in equity cases to be taken before an examiner or master, was not followed, but the amendments to equity rule 67, permitting and authorizing the testimony to be taken in open court, was, by consent of both parties, adopted, and the testimony was taken in the same manner as in a law case tried before the court without a jury.

The complainant contended in its evidence that there existed within the surface boundaries of the Mountain Gem and Jordan lode mining claims, and extending in length and distance more than three miles, a belt of limestone between bodies of quartzite, which constituted a lode, and that the apex or outcrop of this body of lime, which they called the lime lode, was within the surface boundaries of the said Gem and Jordan claims, and therefore they had the apex of, and by virtue thereof the ownership, of the ore bodies in controversy. The defendants claimed that said body of lime did not constitute a lode, but constituted a portion of the country rock in that vicinity. The defendants further maintained that said alleged apex of said alleged broad lode had

portions of its apex within defendants' claims, and that said claims were prior in date to respondent's claims.

II.

DECREE.

The case was argued and submitted to the court for its decision, and on the 23d of March, 1903, the court entered its decree, as follows:

"FINAL DECREE.

"This cause came on to be heard at the May term, was argued by counsel and taken under advisement by the court, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court:

"First: That the motion made by the defendant at the conclusion of the plaintiff's testimony in chief, to dismiss the bill of complaint herein, or retaining the bill, to require the plaintiff to commence an action at law to determine the ownership to the ores or veins in dispute, be and the same is hereby overruled and denied.

"Second: It is further ordered, adjudged and decreed by the court, upon consideration of the pleadings, and all of the evidence taken and given upon the hearing of said cause, that the bill of complaint herein be, and the same is, hereby dismissed at plaintiff's costs.

"JOHN A. RINER, Judge.
"JERROLD R. LETCHER, Clerk."

(Record, page 539).

The complainant, respondent in this proceeding, prosecuted an appeal from this decree, to the Circuit Court of Appeals for the Eighth Circuit, and upon consideration thereof the Circuit Court of Appeals reversed the decree of the Circuit Court, and directed a decree to be entered in favor of the complainant, as we have pointed out. (134 Fed., 769; Printed Pet. for Certiorari, page 17.)

III.

RESPONDENT'S CASE IN CHIEF.

At the trial of the cause the respondent, in presenting its case in chief, introduced evidence tending to prove its title to and possession of the Jordan Extension, Northern Light, Grizzly and Fairview claims, and then rested its case on the theory that there was a common law presumption of right to ownership and right to possession of all ores found vertically beneath the surface of said claims. (Record, pages 39-105.)

IV.

DEFENDANTS' CASE.

In response to this claim, the defendants introduced evidence to prove that the ores in controversy which were found vertically beneath the surface of these claims were the property and in the possession of the defendants, by virtue of their ownership of the Kempton and Ashland lode mining claims, and of the veins which outcropped and apexed therein and thence descended upon their dip into the territory in dispute, and by means of workings upon and actual possession of the ore in controversy.

Substance of matters proved by petitioners, and admitted by respondent, to show their right to the ore in dispute. Reference to petitioner's "Exhibit 1," Ashland Patent, dated September 27, 1875, and to petitioner's "Exhibit 14," Kempton Patent, dated February 23, 1875.

The defendants, to establish their claims, introduced in evidence, as the foundation of their title to the Ashland claim, a patent thereto from the United States, issued to George Hearst, grantee, and then traced by divers mesne conveyances, the title, thus conveyed to the patentee, into the defendant, The Ivanhoe Mining Company and the defendant Wall. This patent for the Ashland claim is dated September 27, 1875, is marked "Defend-

ant's Exhibit 1" (Record, page 106), and is found in the Supplemental Record herein, page 3.

The defendants introduced in evidence, as the foundation of their title to the Kempton lode mining claim, a patent therefor issued by the United States to Benjamin M. Du Rell, Lemuel U. Colbath, and Isaac Schoenberg, dated February 23, 1875, marked "Defendants' Exhibit 14" (Record, page 127), and set forth in the Supplemental Record at page 8. And also proved that by virtue of divers mesne conveyances introduced in evidence the title therein had passed to and was vested in the defendants.

The defendants exhibited a number of maps, illustrating the condition of the country, the occurrence of ore bodies, the location of the Ashland and Kempton veins, the boundaries of the several claims and the workings which related to said veins and disclosed the outcrop, strike and dip thereof, and the position of the ore bodies in controversy with reference to the veins occurring in that vicinity, and with reference to the boundaries of the several claims title to which was asserted by the complainant, and also with reference to the claims of the defendants and other claims in that immediate vicinity.

KEMPTON VEIN; OUTCROP; STRIKE; DIP.

The defendants also introduced certain witnesses who testified concerning the case before the court, to wit, Adolph Jessen (Record, pages 138-162), Lemuel U. Colbath (Record, page 159), Frank C. Moorehouse (Record, page 171), James E. Beveridge (Record, page 217), William R. Smith (Record, page 244), George L. Hannahs (Record, page 259), Isaac B. Hazelgrove (Record, page 270), Heber McNeill (Record, page 278), Enos A. Wall (Record, page 284), and R. G. Legg (Record, page 304). The above beginning at Record, page 138, and ending at page 306. By the testimony of these witnesses, illustrated by the maps and exhibits also introduced in evidence, the defendants proved that there was a large lode or vein of metalliferous ore and rock in place which

had its apex and outcrop at the surface in the Kempton claim, and also a large lode or vein of metalliferous ore and rock in place which had its apex and outcrop at the surface within the surface boundaries of the Ashland lode mining claim, and that these outcrops and apexes of these lodes occurred within the conflict area which respectively existed between the Ashland and Kempton lodes on the one part and the Old Jordan and Mountain Gem claims on the other part, which was patented to the said Kempton and Ashland claims, as is hereinafter more specifically set forth. By the testimony of their witnesses the defendants proved that the east end or termination of the outcrop of the ore vein at the surface in Kempton ground was and is at a point about fifteen feet northwest from the northeast corner post of the said Mountain Gem claim, which post No. 1 is within the exterior surface boundaries of the Kempton claim and upon territory which was patented to the Kempton claim, and that such outcrop of the Kempton vein extended from the point mentioned in said Kempton claim on the surface, and was exposed by various workings for a distance of more than five hundred feet. (See, especially, testimony of Mcorehouse, Record, pages 181, 182; Beveridge, page 230; Smith, pages 244, 250, 251; Hannahs, page 273; McNiel, pages 279, 280.)

The witness Colbath, who was one of the patentees of the Kempton claim, proved that as early as 1873 the owners of that claim were mining on its outcrop of ore, and during that year "shipped ore the whole winter through" therefrom (Record, pages 159, 160); that they sank an incline shaft on the dip of the vein, and when he parted with his interest in the claim, in the spring of 1874, this incline had been sunk to a depth of about one hundred feet, and the underground work had reached a point on the dip of the lode at about the vertical plane of the northerly side line of the Kempton claim; that the vein dipped to the northerly at an angle of about 40 degrees from the horizontal. (Testimony of Colbath, Record, page 160.)

The witnesses for the defendants testified that this ore vein, thus found outcropping in the Kempton claim, had been mined and traced in continuous ore from the surface down on the dip of the vein to the lowest level of the mine under the said adjoin-

ing surface ground and into the ground in controversy, such lowest level being the Neptune Tunnel level, about four hundred feet vertically below the surface. We here call attention to extracts giving the substance of testimony of some witnesses for the defendants respecting these matters.

Mr. Colbath testified:

"Well, I say the first examination I made on the ground was in April, 1873.

"Q. Can you state what there was upon the ground then in the way of ore outcropping at the surface? A. There was a good outcrop at both the Kempton incline and the Neptune.

"Q. An outcropping of ore? A. Ore from the grass roots; it was mined out to the surface.

"Q. You had interests there until what time? A. Well, I sold out in the spring of 1874.

"Q. In the spring of 1874? A. Yes, sir.

"Q. And you know that during that time it was mined from the surface. A. Yes, sir; worked it and shipped ore.

"Q. The surface ore was shipped? A. Yes; we shipped ore during the winter of 1873, the whole winter through." (Record, page 160.)

As to the dip of the lode he said:

"Q. Do you know whether, or state if you know, what dip, if any, the lode had? A. Well, I think about 40 degrees probably.

"Q. Forty degrees? A. Well, yes; I should think about forty degrees.

"Q. From a horizontal? A. Yes, sir.

"Q. Now, do you know whether you had got beyond the side line, the northerly side line of the Kempton, on its dip, before you left it? A. Well, I should think so, yes, or very close.

"Q. You got close to the northerly side line, either one side or the other, before you left it? A. Yes, it dipped to the northerly." (Record, page 160.)

And respecting the width and extent of the outcrop of ore vein at the surface, the witness Heber McNeill testified as follows:

"Q. Now, going back to the year 1884, I will ask you if at that time you did any mining upon the surface of the Kempton? A. Yes, sir.

"Q. What on? A. We mined between the Kempton incline and the old Neptune incline on the surface.

"Q. What did you mine at? A. We mined ore there. The poorest of it we put on the dump for jigging purposes, and the balance was shipped as first-class ore.

"Q. Now, how much did you mine there; how long? A. We mined there from along in June until the snow drove us out in the fall, on the surface.

"Q. What was the extent of the outcrop of the ore there, when you commenced to mine there? A. At the Kempton incline it was about five feet, and as we went towards the Kempton, going west, it widened out to 25 feet, if not more.

"Q. The outcrop of the ore upon the surface? A. Yes, sir; the outcrop of the ore on the surface, at places where the company had worked it. The pillars were left of ore, that they hadn't taken out, and some places where we worked them out." (Testimony of Heber McNeill, Record, page 279.)

As respects the extent of this ore body at the surface *lengthwise* of the Kempton claim, and within the conflict area, the witness William R. Smith testified as follows:

"Q. Now, I will ask you to refer again to this surface map. (Defendants' Exhibit 20.) I see marked on here 'old excavation on the apex of the Kempton vein.' I will ask you if you looked at those excavations and tracings which are projected on that map? A. Yes, sir.

"Q. What did you find? A. I found continuous ore.

"Q. Give the points? A. A point here; there is no mark there. It would be, I consider, about fifteen to twenty feet from where this post should be, over in this direction, number one post of the Mountain Gem.

"Q. Fifteen or twenty feet northwest? A. I think it would be a little—yes, sir, northwest, that is right—or northeast, northeast I think.

"Q. Is that northeast up there? A. No, down here.

"Q. Fifteen or twenty feet northwest of where? A. Northwest of this point.

"Q. To what point? A. Post one (1) of the Mountain Gem; right about there.

"Q. You saw ore there? A. Yes, sir, I think so. It takes the strata, there, some of it, like the fissure came through there and butted up against that; went right through the fissure.

"Q. That is to say, the ore butts up against the fissure there? A. Yes, sir; right into the fissure at this point here.

"Q. And ends there? A. Ends there. There is no ore along here. There is a shaft here on the fissure, but no ore. They cut right into the blue lime, these holes, and they can't be seen going past the lime—it is not shown.

"Q. How far out this way did you trace it to the west? A. Oh, perhaps four or five hundred feet—four hundred feet from the number one (1) post here, from fifteen to twenty feet from the Mountain View (meaning post one of Mountain Gem, as given on the map) westerly." (Testimony of William R. Smith, Record, pages 250-251.)

The testimony of Frank C. Morehouse, concerning the apex in the Kempton ground, was in substance as follows:

"Q. First, I will ask you what examination did you make, if any, for the purpose of determining the apex of what is called the bedded vein in Kempton ground? A. I made an examination of the surface, beginning at stake 904, and following the strippings on the surface, along this line to station 100, the top of the air shaft. I also examined the surface ground across from the air shaft at station 100, going easterly as far as the cuts marked on this map, as being easterly from post 1 of Mountain Gem.

"Q. What did you observe in the way of ore outcropping along that line? A. I observed ore outcropping from station 904 to the air shaft at station 100, to station about 30 feet southerly from the mouth of the Kempton incline station 400. The stripping was shown there, and extended over; there was a stripping extending over to a point marked 'Shaft,' 15 feet about from 10 to 12 feet from stake 1 of the Mountain Gem, northerly; the stripping was in ore, showing a vein, to a point what would be on this map the side line of the Mountain Gem, about 15 feet from the westerly corner post No. 1 from the post marking corner 1 on this map. (Ex. 20.)

"Q. I will ask you if you discovered where the outcrop of ore ended? A. It ended about ten or twelve feet along the side line of the Mountain Gem, as shown on this map, ten feet, or possibly 12 or 15 feet westerly from the point marked (1) of the Mountain Gem claim.

"Q. State whether that is inside of the Kempton surface ground, as delineated on this map? A. It is.

"Q. How does it end there and how do you know it ends there? A. The stripping extends along to that point and the rock is shown beyond, and there is no ore. At a point in which the shaft is sunk there is ore standing. The strike of the ore being

northerly and southerly, and has been stripped from the shaft down for 20 feet probably, showing ore in fissure shape running northerly and southerly. The tunnel marked 'Tunnel' running into this shaft up near what is called post 1—Mountain Gem—on the map, runs in through limestone and cuts the ore I have described standing vertically, nearly up and down, and running northerly and southerly, and there is no ore shown beyond the point 10, 12 or 15 feet westerly of what is here marked post 1, Mountain Gem. These cuts beyond this tunnel are in limestone.

"Q. Would it be called country rock? A. Country rock, yes, sir." (Record, pages 181-182.)

Again, continuing:

"Q. How far at the end here is the stripping driven into the country rock if at all—and what you call the east end of the apex of the Kempton? A. There is country rock from that side of this cut running northerly and southerly from that side for only a few feet to the end of the stripping, but there is country rock between that side of that cut and the end of the ore, stripping beyond the ore shown in the stripping, and is, as I have already said, country rock in these cuts; and at this point it intersects the ore standing nearly vertical and running northerly and southerly and running alongside of that point marked 'shaft.'

"Q. I will ask whether that appears to be a different fissure or formation from the Kempton? A. It is in the same formation, but is a different ore body or a different vein.

"Q. I will ask you whether there is any evidence of ore of value in that? A. Not that I discovered.

"Q. What is it? A. It is mainly an oxidized iron. (Testimony of Morehouse, Record, page 183.)

Heber McNeill, an experienced miner, who had worked several years upon the Kempton, in regard to the termination of the Kempton lode in its course to the east, testified as follows:

"Q. Now, Mr. McNeill, I wish you would, if you can, indicate upon the map, if it be a fact, the extent in length of the outcrop of the fissure in the Kempton ground so far as you know? A. The fissure in Kempton ground?

"Q. The ore—the ore vein? A. The bed vein?

"Q. The bed vein, yes? A. Well, I came from here right out to a point about here.

"Q. When you say 'here,' designate it by some mark? A. Well, it is this point here, what do you call this?

"Q. 1342 is the mark there? A. Well, it is about fifteen or twenty feet west of this Gem post marked 'No. 1.' That is where I think we found that the bed vein stopped.

"Q. How does it stop—what against? A. It goes up against what we miners call limestone or country rock at this point here, about fifteen or twenty feet west, or probably a little more from post No. 1 of the Gem." (McNeill, Record, pages 279-280.)

ASHLAND VEIN, OUTCROP, APEX, STRIKE, DIP.

The evidence introduced by the defendants proved that the Ashland vein was a fissure, which transected the alternating belts of quartzite and limestone, and extended in a northerly and southerly direction, entering the southwesterly end line of the Ashland mining claim, U. S. Survey No. 67, and extending thence northerly, with its apex wholly within the patented surface area thereof, for a distance of at least eight hundred feet. (Testimony of Moorehouse, Record, pages 173, 183; and of the witnesses Hannahs, Wall, Legg and Beveridge.) It was further proved that the ores of that portion of the Ashland fissure which extend to, unite with and become a common ore body with the Kempton bedded vein, are so blended with the ores of the Kempton bedded vein at this junction as to form one common mass or body, so that the only means of distinguishing the probable genesis or relation of any part of the combined ore body to the respective fissure and bedded veins there uniting, is found in the consideration and examination of the crystalline or structural growth lines of the mass of ore. (Testimony of Wall, Record, pages 284, 285.) It was in view of these conditions, which are clearly explained in his testimony, that the witness Moorehouse in substance said that the fissure vein and bedded vein were not separate veins, but were distinct veins, meaning thereby that they were united at the junction, upon their dip and elsewhere were distinct, and that the said Ashland fissure was one of the mineralizing agencies in making the metalliferous deposition of what is called the fissure vein and bedded vein, and that the bedded vein and the fissure

vein were thus formed at the same time and from the same sources. (Testimony of Moorehouse, Record, pages 196, 197, 198.) While the beds of limestone and quartzite have a dip of from 30 to 35 degrees from the horizon in a northwesterly direction, the Ashland fissure vein has a dip of from 60 to 70 degrees from the horizon. (Testimony of Moorehouse, Record, page 212. As is hereafter more specifically explained, the Ashland fissure vein and the Kempton bedded vein are distinct from all other veins and lodes, and upon their dip, at about the "turn-sheet" level, form one mass of ore.

For details of testimony proving existence, extent, character, continuity and location of the Ashland vein and its apex, showing it to consist of a continuous vein of ore in rock in place, extending from its apex in the quartzite and limestone to the ores in controversy, and to situated as to give apex rights to the defendants, see testimony of the following witnesses:

Moorehouse, Record, pages 173-189.
Beveridge, Record, pages 218-221.
Hannahs, Record, pages 259-265.
Legg, Record, pages 304-305.
Wall, Record, pages 284-304.
McNeill, Record, pages 278-284.

RESPONDENT'S ADMISSIONS.

At the trial, and after the defendant had introduced the testimony of the witnesses Colbath, Moorehouse, Beveridge, W. R. Smith, Hannahs, Hazelgrove, and a part of the testimony of Heber McNeill, the respondent, by its counsel, admitted that the ore was continuous from the respective outcrops of the apexes respectively of the Ashland and Kempton veins in their respective claims, as had been testified to by the witnesses named. The admission occurred as follows:

"Q. Now, I wish, Mr. McNeill, you would describe what you know about the continuity of the vein, from the top where you

say you mined the croppings in 1884, down to the lower workings, and their connection with the lower workings in the Ashland fissure, if you know it?

"Mr. Dickson: As to the continuity of the ore, speaking of the bed vein, or the fissure vein, as testified to by the other witnesses, we do not dispute, we do not question." (Record, pages 282-283.)

This refers to and concedes the correctness of the testimony of the witnesses who had preceded Mr. McNeill and had testified about the continuity of the ore in the bedded vein, which is the Kempton vein, and in the fissure vein, which is the Ashland vein, and from which evidence we have made extracts, exemplifying its general character. This continuity of the ore was disclosed in the extent of the vein upon strike and dip, at the surface and underground, as the witnesses had described it, and defined and located the extent and position in the general mass of the country or country rock of the Ashland fissure and Kempton bedded veins. There was thus established the existence of these veins, their extent, both upon strike and dip, the continuity of their ore bodies, and their union at the point to which reference has been made, and their separation from the surrounding country rock; in short, their clearly defined individuality.

Thus, by the patents of the Kempton and Ashland claims introduced in evidence, the testimony of the witnesses called by the defendants, and the admissions of respondent's counsel, the petitioners proved these ultimate facts, which establish their ownership and their possession of the ores in controversy in this litigation; their legal title to the Kempton and Ashland claims, described in the pleadings, and to all lodes and veins apexing or outcropping therein; that the veins and lodes apexing and outcropping within said claims had their apexes so situated with regard to said claims as to give extra-lateral rights to the same upon the dip of the veins whose apexes were in them; that they extended beneath the surface boundaries of the Grizzly, Jordan Extension, Fairview and Northern Light claims, to quiet the title to the ores in which this suit was brought by the respondent; that the ore in controversy was contained in the Kempton and Ashland veins and in portions thereof which were the property of the petitioners, and that the veins in said Ashland and Kemp-

ton claims were continuous in ore upon strike and dip throughout an extent necessary to maintain the right of the defendants to follow said veins into the territory in question. The evidence upon this subject was full, complete and convincing, and presented all the facts which, under the Federal statute concerning the ownership of lode mining claims located upon the public mineral domain of the United States, give the right to follow veins upon their dips beneath the surface of other claims. The admission of counsel, taken in connection with the circumstances disclosed in the testimony, established the ownership by the defendants of veins which were traced continuously upon ore, from their apexes into the ore bodies in controversy, and which said ore bodies were thus shown to be parts of and contained in the said veins outcropping and apexing within the said Ashland and Kempton claims. This testimony overcame any presumption asserted by respondent to arise from proof of ownership of the surface of said claims by the respondent.

U. S. Revised Statutes, section 2322.

Mining Company vs. Tarbett, 98 U. S., 463.

Iron-Silver Mining Co. vs. Cheesman, 116 U. S., 529.

Argentine Mining Co. vs. Terrible M. Co., 122 U. S., 478.

Iron-Silver Mining Co. vs. Elgin Min. Co., 118 U. S., 196.

Last Chance Min. Co. vs. Tyler Min. Co., 157 U. S. 687.

Delmonte Min. Co. vs. Last Chance Min. Co., 171 U. S., 65.

Walrath vs. Champion Min. Co., 171 U. S., 305.

Hyman vs. Wheeler, 29 Fed., 347.

Waterloo Min. Co. vs. Doe, 82 Fed., 55.

By the averments of the amended answer, and the evidence aforesaid, the defendants made out a defense which, in a like case, the Ninth Circuit Court of Appeals has decided to be all sufficient.

In Carson City, etc., M. Co. vs. North Star M. Co., 83 Fed., 658, it was decided as follows:

"It therefore follows that when the defendant introduced its patent, proved the course of the lode lengthwise within the surface limits of the patented ground, and that all the ore which it had extracted from beneath the surface ground of the Irish-American claim was taken from said lode, as set forth in the findings, it clearly, and beyond all question, established its right to the ores thus taken out. No further proofs were required."

Having thus fully established their defense, and their ownership of the ores in controversy herein, the defendants rested.

V.

RESPONDENT'S REBUTTAL.

Upon the conclusion of the defendant's testimony, the respondent introduced evidence, and presented its case in what may be denominated rebuttal.

"Mr. Sutherland: We will offer our title to the Jordan and Mountain Gem mining claims. The first is the Old Jordan. I offer in evidence what purports to be an exemplified copy of various papers upon which the patent to the Old Jordan was granted, including the patent itself, certified to by the commissioner of the General Land Office, the purpose of it being to show that the patent, in addition to proving title to the claim, that the patent was granted upon the location notice which was annexed to the transcript, showing the location in 1865. We claim that this vein is a broad vein, not merely the ore body which they have testified to, but it is a vein from 125 to 200 feet in width, and that their claim is laid upon a part of the width of the apex, and we claim the Jordan and Mountain Gem are laid at another part of the width of the apex, and we claim that under the law and decisions, that where two claims are located upon a broad apex, the one which is oldest in point of time is oldest in point of right; the oldest claim taking the extra-lateral rights for the whole vein. Now, the rule is also to the effect that where a patent has been granted, that the patent relates back to the first step, viz.: to the location; and in order to show that our right is older than theirs, we must go back to the location notice, and we must go further, as the authorities say, and show that from which we deraign our title from the United States was based upon that particular location notice, so as to tie our rights back to it."

The Court: It will be admitted, subject to your objection, without a ruling at this time. (Record, pages 306-307.)

The copy of the notice of location thus admitted in evidence *pro forma*, is complainant's Exhibit "V," and is as follows:

"NOTICE. JORDAN S. M. CO.

"The undersigned members of the Jordan Silver Mining Co. claim for mining purposes one share of two hundred feet each and one additional claim of two hundred feet for original discoverer, George R. Ogilvie, on this lead of mineral ore, with all its dips, spurs and angles, beginning at the stake situated one hundred feet northeast of Gardner's shanties in Bingham (Canion) Kanyon, in West Mountain, and running two thousand two hundred feet in a westerly direction along the side of said mountain, on a line with Bingham Canyon, and intend to work the same according to the mining laws of this Mining District.

"(Signed by 25 locators.)

"Bingham Kanyon, Salt Lake City, Utah Territory, Sept. 17, 1873.

"A. GARDNER, Recorder."

(Record, page 307.)

And in like manner and under like objections and the same conditions, the notice of location of the Mountain Gem claim was introduced in evidence. It is marked plaintiff's "Exhibit Z," and is as follows:

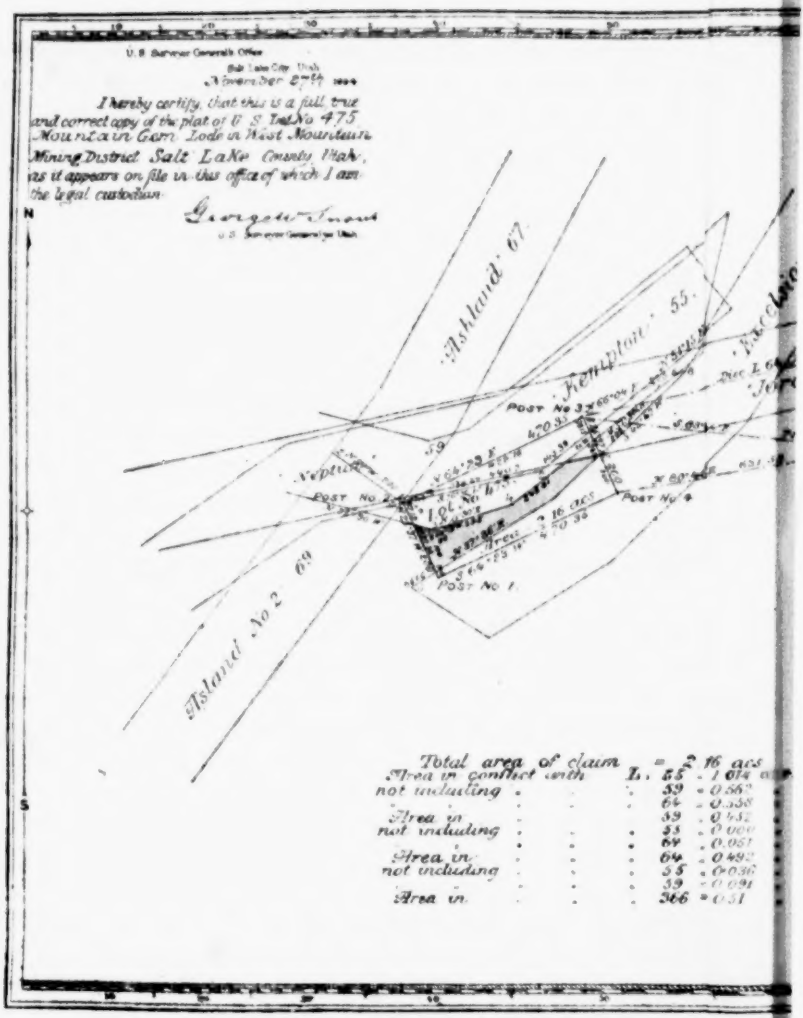
"NOTICE. MOUNTAIN GEM CO. & LODE.

"We, the undersigned, claim sixteen hundred feet of this lode, known as the Mountain Gem, with all the dips, spurs, angles, offshoots and variations, and intend to work the same according to the mining laws of this district. Said claim is situated W. of the Pollock, commencing at a cut in the hill and running S. two hundred feet to a gulch and N. fourteen hundred feet from said cut parallel with the Pollock lode.

"(Signed by 8 locators.)

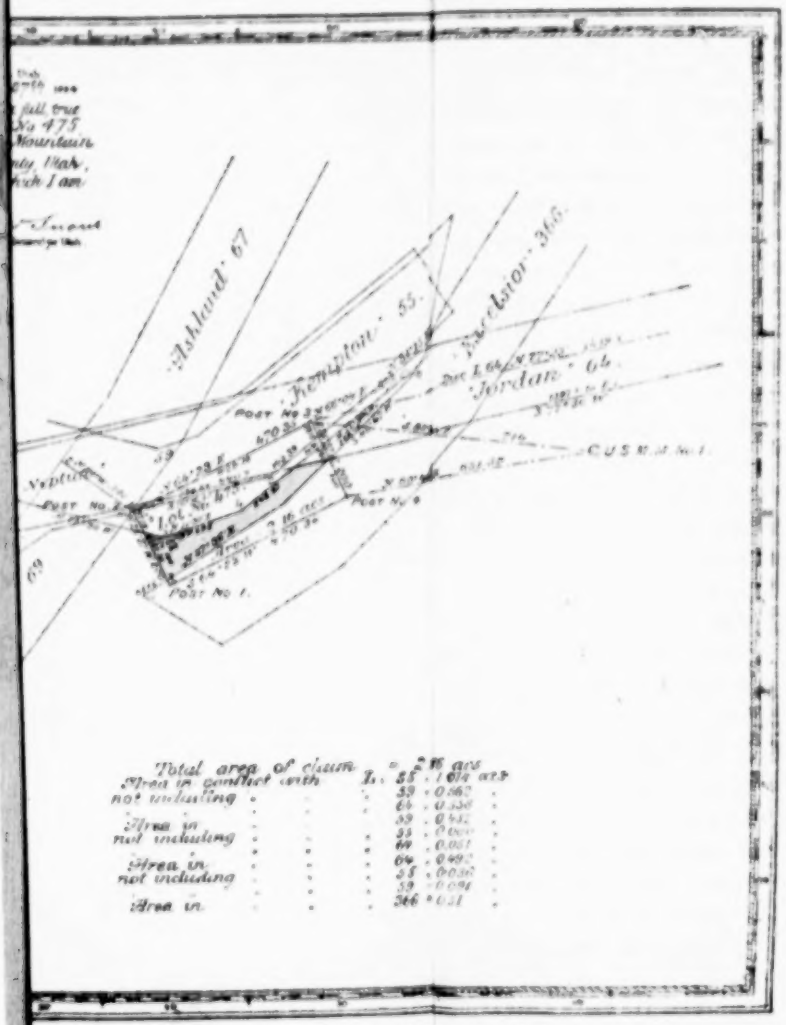
"Located Aug. 20th, 64.
"Recorded Aug. 24th, 64.
"Bingham Canyon, West Mo'nt'n Dist.

"JAS. S. WARREN, Dept. Recd."


U. S. Surveyor Generals Office
Salt Lake City, Utah
November 8th 1904
I hereby certify, that this is a full, true and correct copy of the plat of U. S. Tract No 475 Mountain Gem Lode in West Mountain Mining District Salt Lake County, Utah, as it appears on file in this office of which I am the legal custodian.
Georgetown
U.S. Surveyor General for Utah
N
S
Ashland 67
Hemlock 55
Neptune
Lot No 1
POST No 1
POST No 2
POST No 3
POST No 4
Ashland No 2 69
Total area of claim = 2 16 acs
Area in conflict with L. 55 = 1 614 acs
not including . . . 39 = 0.567
. . . 64 = 0.338
Area in . . . 39 = 0.452
not including . . . 55 = 0.001
Area in . . . 64 = 0.057
not including . . . 64 = 0.492
. . . 55 = 0.036
. . . 39 = 0.091
Area in . . . 366 = 0.31

Scale of this reduced copy: 400 ft. to an

(675)



Total area of claim 55.16 acres

Area in conflict with			55.16 acres
not including			55.0462
			55.0536
Area in			55.0432
not including			55.0000
			55.0051
Area in			55.0492
not including			55.0000
			55.0000
Area in			55.0091

August 20th 1895

Mineral Survey No 439

Lot No 675

Utah Land District

PLAT

OF THE CLAIM OF

The Old Jordan and Galena Mining Co

KNOWN AS THE

Mountain Gem Lode

in West Mountain Mining District, Salt Lake County, Utah

Containing an area of 2.46 Acres

Basis of Survey 300 Feet to the mile

Variation 16°40' East

Surveyed September 28, 29 1895 By

Wayne Bewley

U.S. Deputy Mineral Surveyor

The Original Field Notes of the Survey of the Mineral Claim of The Old Jordan and Galena Mining Co

known as the

Mountain Gem Lode

[illegible] which this plat has been [illegible] and approved. This the claim [illegible] and I hereby adopt the same as [illegible] of said claim as [illegible] and [illegible] and that such [illegible] as to me are shown to be related to other permanent monuments as well ascertainable and [illegible]

I further certify that The Old Jordan [illegible] of [illegible] has [illegible] and [illegible] to said Mining Claim is distant [illegible] to the [illegible] and that said [illegible] is 4 × 6 × 100 ft. deep

That [illegible] of said improvements [illegible] Lode, as I shall not [illegible] of said Lode or improvements has been included in the [illegible] of any adjoining claim.

And I further certify that this is a correct plat of said Mining Claim made in conformity with said original field notes of the survey thereof, and the same is hereby approved

U.S. Deputy Mineral Surveyor
Salt Lake City, Utah
April 28th 1896

George C. Flower
Chief Clerk in Charge

Plat No 2

f this reduced copy: 400 ft. to an inch.

(Record, page 314; see Book "M," page 33; relocated as the Ameer, see Book "M," page 356.

It should be here noted that the lode and ground described in the Mountain Gem notice of location is not the same lode and ground described in the Mountain Gem patent. This disagreement appears on the face of the papers, and is hereinafter explained in this argument.

The respondent introduced in evidence a patent from the United States for the Jordan Silver Mining Company's mine, U. S. lot, survey No. 64. This claim is called in this brief, and generally, Jordan claim. This patent was issued and is dated July 14, A. D. 1877, and is in evidence as a part of "Exhibit U." (Record, page 551.) Also a patent from the United States to the Mountain Gem claim, as a part of plaintiff's Exhibit "Y," the same patent being for U. S. Survey Lot No. 475, and bears date July 18th, A. D. 1898. Record, page 557.)

These patents had accompanying plats, showing the extent of said claims, their exterior surface boundaries, their relative position to contiguous and conflicting claims and the areas of conflict with claims, with which they severally conflicted.

Opposite this page of this brief there is a plat of the said Jordan patent, showing the area of conflict between the Jordan and the Kempton and Ashland claims, and the area which was expressly excluded and excepted from the Jordan patent in favor of the Kempton and Ashland claims, as is set forth in said patent, and as in fact was and may be platted from the description specifically set forth in said patent, and opposite this page is also the plat of the Mountain Gem, survey No. 475, which shows its conflict with the Kempton claim. In the Jordan patent there is an express exception in favor of the Kempton claim, U. S. survey, lot No. 55, and the Ashland claim, U. S. survey, lot 67, in the following words:

"It being the express intent and meaning of these presents to convey to the grantee herein fifty-two hundred (5,200) linear feet of the said Jordan Silver Mining Company's mine, together with the surface ground hereinbefore described, which is not embraced by said surveys Nos. 39, 53, 55, 67 and 69, as represented by yellow shading in the following plat:" (Record, page 555.)

Then follows the patent plat, showing said exclusions as presented in the plat facing ~~this~~ page. *27.*

The Mountain Gem patent contains an express exception from its grant of the conflict area between the Kempton and Mountain Gem claims in favor of the Kempton, and in these words:

"Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said mining claims or lots Nos. 55, 64 and 366, and also all that portion of said Mountain Gem vein or lode, and all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot No. 475 extending four hundred and seventy and thirty-five hundredths feet in length along said Mountain Gem vein or lode; the granted premises in said lot containing sixty-hundredths of an acre of land, more or less." (Record, page 558.)

The general exception in the Mountain Gem patent embraces an area of 2.16 acres. The area thereof, excluded by the exception in the Gem patent to the Kempton claim, U. S. lot 55, is 1.014 acres. (See plats of Jordan Mountain Gem patents above referred to.)

The respondent introduced the testimony of the witnesses Albert F. Holden, Andrew F. Mayberry, Michael Gibbons, Charles Brink, O. A. Palmer and Sidney W. Tyler, concerning the ore body in dispute, and contended that it is a part of a belt or zone of limestone extending about three miles (testimony of Holden, Record, page 323) in an east and west direction in the West Mountain mining district, and that it is from 100 feet to 200 feet in width, and that it lies between a footwall of quartzite on the south and a hanging wall of quartzite on the north, and that the limestone constitutes a homogeneous broad lode. They also claimed that this zone of limestone is much broken and fissured, and altered chemically, and that in some places continuous ore had been found from such alleged footwall to the hanging wall so-called. (See testimony of above named witnesses, Record, pages 323 to 463.)

It was testified by Holden, the manager, and a witness for respondent, that the Kempton and Ashland claims included part of

this line belt alleged by respondent to be a broad lode (testimony of Holden, Record, page 352); that is, a portion of the alleged line lode, outcrop or apex. The great part of the testimony introduced by the respondent related to conditions in the alleged broad lode outside of the Kempton and Ashland ground and far away therefrom. Moreover, the testimony of the witnesses on both sides was that in this mining district the crust of the earth is formed of alternating belts of limestone and quartzite, which extend in length in an east and west direction in the district; that into this limestone and quartzite strata there are frequent intrusions of porphyry, in some places in the form of dykes, which cut across the strata from north to south, and in some places such intrusions are in the form of "sheets," which "intercalate" the veins.

With this presentation, the respondent rested.

VI.

GENERALIZED STATEMENT OF THE TESTIMONY OF THE PETITIONER IN SUR-REBUTTAL CONCERNING THE NON-DISCOVERY AND NON-DEVELOPMENT OF ORE IN THE GEM CLAIM.

The petitioners, in disproof of respondent's case, introduced testimony of witnesses which proved that the veins which they designated the Ashland and Kempton, are not confined to the alleged line lode, but exist in the limestone and in the quartzite, but to a larger extent in the limestone by reason of its greater susceptibility to the actions of the forces which it is supposed preceded as well as ~~confirmed~~ accompanied and fitted the limestone to receive the deposition of metallic ore bodies as we now find them in the enclosing rocks, and to the deposition of minerals therein; that the ore was, however, deposited in the said Ashland and Kempton lodes, and not generally in the limestone; that the limestone, as to the portions of the vein found in it, constituted the country rock enclosing the walls of said veins; that the ore vein and body which is in controversy in this suit, is not a brecciated mass of metalliferous ore or metal lying between walls of quartzite, but is a solid mass of ore lying for the greater part in the limestone, which mass

of ore has in past times by a process of what in the testimony is described as metasomatic action, or replacement, replaced the limestones, and in some places the quartzite as well, wherever along either the limestone or quartzite belts the conditions were favorable to such replacement. That this metasomatic result has been brought about by the action of the metalliferous vapors and solutions, which have ascended or circulated through the Ashland and other fissures adjacent thereto, and through rifts in the limestone and quartzite, caused by intrusions therein of porphyry and other igneous rocks; and that according to these conditions, the result is, that the limit of the limestone is not the limit of the lode, and that the limestone is not a lode at all; but the limit of the lode in every case is the limit of mineralization, or rather, of metalliferous deposition, whether it be in the limestone, or quartzite, or porphyry, or any other non-metalliferous rock whatsoever. That this alleged broad lode is, in many, or most parts of it, but barren stratified limestone, and has not such a defined metalliferous homogeneity as to be a lode between walls of quartzite, or other different rock, or at all.

The maps of respondent indicate a surface conflict between the Mountain Gem and Ashland claims, with an ore outcrop within this indicated conflict, but no evidence supports this map indication, but the evidence in the case shows that there was no surface conflict whatever between the Mountain Gem and Ashland claims, and that the ore shown to be in said conflict lies wholly within the Ashland claim as patented.

The respondent adduced no testimony whatever tending to prove that there is any ore vein or deposit outcropping or visibly developed in the Mountain Gem claim, outside the conflict area, between that claim and the Kempton claim, and which was patented to the Kempton. The following on that subject was elicited by petitioners, by a cross-examination of respondent's witnesses, Tyler and Holden:

"Q. Now, I wish to call your attention, Mr. Tyler, to plaintiff's Exhibit 'T' for a few moments. I first call your attention to the excavation on the Mountain Gem, marked 13 in the Roman numerals apparently. Is that intended to mark that fissure? A.

Well, that is one of Mr. Smith's triangulation points, S. 220, I think it is.

"Q. Were you down in that excavation? A. I think so, I think I remember going into that.

"Q. What is the depth of that? A. As near as I can remember, I was down about 25 or 30 feet.

"Q. What is it in? A. It is limestone, and the tracing here along the sides, that is oxidized ore and at the bottom I found some sulphides.

"Q. Did you find anything of value in it; any valuable ores? A. Nothing that I would want to mine myself just now." (Record, page 448.)

Holden, another witness for respondent, testified as follows, on cross-examination:

"Q. Now, you have some workings on the Mountain Gem? A. Yes, sir.

"Q. Right on your lode? A. Yes, sir.

"Q. There was no ore that you could get a value from? A. I bought the Mountain Gem myself; that is, I negotiated for it.

"Q. I do not care anything about the history of the title; I asked you about the fact, if the ore you found in the Mountain Gem was valueless? A. It was neither in quality or quantity sufficient for shipping." (Record, pages 357-358.)

On rebuttal of respondent's case, the petitioners adduced the following from their witness, Morehouse:

"Q. You know where the Mountain Gem discovery is? A. Yes, I have seen the post marked discovery of a lode corresponding to the Mountain Gem, as I found at 475.

"Q. What does the discovery consist of; what did you see there? A. I saw a stake, an old stake 4x4 square, stuck in the debris.

"Q. Driven down in loose rock and material like talus? (Objected to as leading.) A. It is driven, I don't know what it is driven through; it is driven or stuck down into the debris, dirt, soil and rock, loose rock.

"Q. What was there in the way of mining or excavation there? (Objected to by the plaintiff as not rebuttal and seems to be wholly irrelevant to anything we have drawn out.) A. There is not, and never was any. It is as I have described, running down into the debris and loose rock, and no openings at that point." (Record, pages 486-487.)

And the foregoing was all the testimony elicited on the subject of the contents of the alleged discovery of the Mountain Gem claim.

The nature and extent of the actual conflict between the Gem and Ashland and Kempton claims, and the true position of what was and what is now claimed as the Gem discovery, is discussed more fully in another connection. Petitioners' Exhibit 20 shows the surface workings on the Kempton and Ashland ground, and the surface tracings upon the Ashland cross fissure, and also the easterly and westerly limit of the outcrop of the ore vein on the Kempton claim, as testified to by the witnesses William R. Smith (Record, pages 250-251), by Moorehouse (Record, pages 181-182), by McNeill (Record, pages 279-280), by Beveridge (Record, pages 219-220), and by Hannahs (Record, pages 259-261). A copy of Exhibit 20 is found bound in at the back of this brief.

There is also at the back of this brief a tracing copy of the petitioners' Exhibit 21, of reduced dimension, which shows much of the underground workings in the several levels of the Kempton and Ashland mines.

This plat reproduces all of petitioners' Exhibit 21, and in addition thereto, for the purpose of illustrating this argument and showing just what territory the respondent owns by virtue of its Jordan patent, there has been colored in yellow all the territory patented as a part of the Jordan claim, and in brown all the territory patented as a part of the Mountain Gem claim, leaving in white the conflict territory patented to conflicting claims, such as the Kempton, the Ashland, the Galena, the Excelsior, etc. There is also drawn a red line at the bottom of the map, parallel with the side lines of the Jordan claim, indicating the erroneous position of the south side line of the Jordan as assumed in the opinion of the Circuit Court of Appeals, and upon which assumption that opinion is based.

The tunnel marked "Upper Kempton Tunnel" is colored green, and is the upper level, or level nearest the surface. The workings marked by *yellow* are on what is called the "Turn Sheet Level," which is next below the Kempton Tunnel level, and is about 300 feet beneath the surface. The next workings are in vermillion,

and are the lowest or Neptune Tunnel level about 400 feet beneath the surface of the earth. This Neptune Tunnel was commenced before 1877, and was made for the purpose of working and developing the Kempton ore vein at depth. (Testimony of Colbath, Record, page 161.)

All of the tunnels, shafts, inclines and drifts connect with the ore vein at its outcrop at the surface in Kempton and Ashland ground (see admission of respondent, Record, page 283), and have been made and occupied by the petitioners and their predecessors in interest for more than thirty years before the commencement of this action. None of the work in these mines has ever been in the possession or occupation of the respondent, except that during the trial in the Circuit Court the underground work which is denoted on the map as "Holden Raise," was connected with the works of the petitioners on the Neptune Tunnel level, near the line of the Sampson cross fissure. (Testimony of Mayberry, Record, page 372.) On this map there is also shown a mining tunnel belonging to the respondent, designated as United States Tunnel No. 1, West Drift, which leads along the course or strike of the limestone belt, but to the north of the underground works of the petitioners. (Testimony of Holden, Record, page 359.) This latter work is of comparatively recent date. (Testimony of Neill, Record, pages 509-510.)

We reserve for further and full discussion the question of the existence of the alleged broad lode, and the location and extra-lateral rights of the Jordan and Mountain Gem and Kempton and Ashland claims, respectively.

VII.

SPECIFICATIONS OF ERRORS.

Upon the foregoing statement and the record in this cause, petitioners assign and specify the following errors:

First—The Circuit Court of Appeals erred in admitting into its consideration of this case as material evidence herein, or at all, the alleged notice of location of the old Jordan claim, which is copied in this brief at page 26.

And also the alleged notice of location of the Mountain Gem claim, which is copied at page 26 of this brief, because the same, and each of them, was immaterial, and incompetent as evidence in this cause, and had, and could have, no legitimate bearing upon the issues in this case.

Second—The Circuit Court of Appeals erred in deciding that the issuance of the patents to the owners of the Kempton and Ashland claims did not conclusively determine the priority of their discovery and location, over the Old Jordan and Mountain Gem claims, respectively.

Third—The Circuit Court of Appeals erred in its decision, in not giving effect to the exceptions in the said Jordan and Gem patents, respectively, whereby the lode, or lodes apexing in the said overlapping and conflict area, and the lateral rights incident thereto, were expressly excepted and excluded from said grants, in favor of the Kempton and Ashland grants, respectively, because the respondent did not, by pleading or evidence, assert or prove, that its case was without said exceptions, or that it was not bound thereby, and it was bound thereby.

Fourth—The Circuit Court of Appeals erred in deciding by implication that section 3511 of the Revised Statutes of Utah, 1898, dispenses with the legal requirements of a trial by jury in a suit to quiet title to land, wherein the legal title and estate, and right to possession of the same, is the matter in dispute; and that in this case the legal remedy is inadequate; by which decision these petitioners were deprived of their right to trial by jury, contrary to the first clause of the seventh amendment of the Constitution of the United States.

Fifth—The Circuit Court and the Circuit Court of Appeals erred in not dismissing the amended bill *sua sponte*, because it appears on its face, as well as in the evidence adduced in support of it, that it is an ejectment bill, because the dispute between the parties relates to purely legal titles, estates and rights to possession of the ores, lode and premises in controversy; and further, because there is an entire omission in said bill to allege that the legal right of complaint has been previously established at law; nor does it allege that any action at law is now pending to estab-

lish such legal title; and no impediment is alleged therein, nor otherwise shown to exist, to an action at law being brought, to try such legal title, estates, and rights to possession in the premises.

Sixth—The Circuit Court of Appeals erred in finding and deciding that the stratum of limestone, referred to in the testimony, constitutes a single broad vein or lode of mineral-bearing rock, extending from the quartzite on one side to the quartzite on the other, and in reversing the decree of the Circuit Court in favor of defendants on the merits.

Seventh—The Circuit Court of Appeals erred in not accepting and following the decision of the Circuit Court, upon the merits of the case, on the conflicting testimony, the trial judge having heard the witnesses in the case orally.

Eighth—The Circuit Court of Appeals erred in not finding and adjudging that even if the lime belt was determined from the evidence to be a broad lode, the ores in said lode upon its dip in the territory in controversy were the property of the petitioners, since they held patents to the conflict area between the Jordan and Mountain Gem claims and the Ashland and Kempton claims, containing, as to part thereof, the entire width of the outcrop of the alleged broad lode, to wit, the limestone belt, and as to the other, the greater part thereof, and were prior claims under the law to the Jordan and Mountain Gem claims.

Ninth—The Circuit Court and the Circuit Court of Appeals erred in not dismissing the bill of complaint, since it appeared from the evidence that the petitioners were in the actual possession of the ore and lodes in dispute when the suit was instituted, and the Circuit Court sitting in equity was without jurisdiction of the controversy, and the petitioners were entitled to a jury trial, and seasonably made objection to the jurisdiction of the court in equity and demanded a trial by jury.

Tenth—The Circuit Court of Appeals erred in its opinion in locating the position of the Jordan lode mining claim, in this, to wit, that it placed the south side line of the Jordan lode mining claim some two hundred feet south of its actual position as defined in the patent of the Jordan claim and as it existed in fact

upon the ground, and also made a like erroneous location of the position of the limestone belt claimed by the respondent to be the broad lode, and based its determination that the Jordan lode mining claim, as patented, contained the greater portion of the limestone outcropping where it would cover largely the ore in dispute, on these erroneous determinations, and thus made these misconceptions of the position of the boundary lines of the Jordan lode mining claim and of the limestone belt outcropping essential bases of the opinion it delivered and the decree which it directed.

Eleventh—The Circuit Court of Appeals erred in not affirming the decision of the Circuit Court in behalf of the petitioners, upon the contention of the defendants that there was contained respectively in the Kempton and the Ashland claims, and apexing therein so as to give extra-lateral rights to the owners of said claim, and extending thence to and including the ore bodies in dispute, certain mineral bearing veins, apexing respectively in the quartzite and limestone formations, and extending thence through quartzite and limestone layers to the ore in controversy, and having for their walls and as the country rock including said lodes, as to the Kempton vein, limestone; and as to the Ashland vein, alternate layers of quartzite and limestone.

Twelfth—The Circuit Court of Appeals erred in finding, and making this finding a basis of its reversal of the decision of the Circuit Court, that the respondent had established that the Mountain Gem and Jordan claims were prior in point of valid location to the Ashland and the Kempton claims.

Thirteenth—The Circuit Court of Appeals erred in finding that the Jordan claim had any apex whatever which gave it an extra-lateral right to any of the ore in dispute.

Fourteenth—The Circuit Court of Appeals erred in finding, and in making this finding a basis for its decision reversing the decree of the Circuit Court, that the Jordan and Mountain Gem claims respectively were prior and valid locations to the Ashland and Kempton claims respectively.

VIII.

ARGUMENT.

1. We have endeavored, in what has preceded, to state the nature of the controversy which was passed upon in the first instance by the Circuit Court of the United States for the district of Utah, and then by the Circuit Court of Appeals for the Eighth Circuit. We have also pointed out the matters involved in the opinion and decision of the Circuit Court of Appeals, wherein we maintain that court committed grievous errors against the petitioners. From these preceding statements, which we have presented with sufficient fullness to enable the court to understand the nature of this controversy and the respective contentions of the litigants, it appears that the respondent bases its claim to the ownership of the ore in controversy entirely upon an asserted ownership of the apex of the lime belt constituting the so-called broad lode, by virtue of the inclusion of a portion of the outcrop or upper or basset edges of that lime belt within the surface boundaries of the Jordan and the Mountain Gem claims. By the bill of complaint and the evidence introduced by the respondent, it seemed perfectly clear that not only did the respondent not claim the ownership of the ore by virtue of any title it had to the Northern Light, Jordan Extension, Fairview and Grizzly claims, but in the complaint it is affirmatively stated that the ore bodies in controversy were contained upon its dip in a lode having its apex within the surface boundaries of the Jordan and Mountain Gem claims. The result of this contention and of this situation is that when the respondent rested its case it had failed to prove any title whatever to the ores in controversy. The petitioners have patent title to the surface ground within which is found the apexes respectively of the Ashland and Kempton veins, which extend in continuous ore into and constitute and contain the ore bodies in controversy. There were surface conflicts respectively between the Jordan claim and the Ashland and Kempton claims. This surface conflict included, so far as the Jordan was concerned in its conflict with the Ashland claim, the entire width of the Jordan claim and of the so-called lime lode, and as well the apex of the Ashland vein,

and as to the Kempton claim, another portion of the alleged outcrop of the lime belt or so-called broad lode, and to the extent of the conflict, the outcrop of the Kempton vein, and included the entire width of the Jordan claim. There was also a surface conflict between the Mountain Gem claim and the Kempton claim, and in this conflict was contained a considerable portion of the outcrop of the alleged lime lode or broad vein, so that there was more surface area contained within the conflict between the Kempton and Mountain Gem claims, and more of the outcrop of the alleged broad lode, than was contained in that portion of the Mountain Gem, finally patented as a part of that claim. The conflict between the Mountain Gem and Kempton claims, which was patented by the Kempton, amounted to 1.014 acres, while all of the territory which was patented to the Mountain Gem was six-tenths of an acre only. All of the conflict between the Ashland and Kempton claims and the Jordan claim was patented to the Ashland and Kempton claims. All of the conflict between the Kempton and Mountain Gem claims was patented to the Kempton claim. In addition to the fact that the Kempton and Ashland claims patented all of the conflict between those claims and the Jordan and Mountain Gem respectively, considerable portions of the Jordan and Mountain Gem claims were patented to other conflicting claims. The result is that if the untenable contention of the respondent, that the lime belt constitutes a broad lode, should be sustained, and if it could be possibly held, and we maintain that it is not possible so to hold, that the ores in controversy are in and constitute a part of a broad lode, which is the lime belt, nevertheless, even upon the further concession of the legal contention made on behalf of the respondent, and sustained by the Circuit Court of Appeals, that where an outcrop is so situated, with reference to the surface lines of claims, that a portion of it in its strike lies in each of them, that a claim may base extra-lateral rights thereon, although but a part of the apex is within its claim, if it is older than the other claim, which has a portion thereof, still, as a result of the fact that there was a conflict in location between the Ashland and Kempton, owned by the petitioners, and the Jordan and Mountain Gem, owned by the respondent, which resulted in the patenting of that conflict to the claims of the petitioners, the

respondent can, as against the petitioners, assert no title to the ores in dispute.

We shall first, because of the necessary result following from this contention, which renders the investigation of a number of disputed questions of law and also of fact, unnecessary, investigate the legal effect of the title to the surface claims which cover the alleged outcrop of the asserted broad lode.

We maintain, as a legal proposition which we think sufficiently expresses the question to be decided upon this subject, that the senior patents are protected, against alleged prior conflicting locations, by indisputable presumption that when issued they had superior title and were therefore based upon prior valid locations to the ground in conflict, and therefore were prior in valid locations to the locations of the conflicting claims. Or, to express it in another way, that when the Ashland claim secured a patent to the area in conflict with the Jordan claim, it secured a title upon which there rests the conclusive presumption that it was in those proceedings adjudicated that the Ashland location was superior to the Jordan location in the matter of valid locations respectively of these claims, and that thereafter, whenever a controversy might arise between the owners of these two claims, the determination of which was controlled by priority of location, the patenting of the Ashland conclusively settled that controversy in its behalf.

The general question is, What is the legal effect of the patents?

The decision of the Circuit Court of Appeals gives an all-controlling effect to the alleged prior locations of the Jordan and Gem claims, over senior patents to overlapping claims, which conflict on the surface with the entire width of the Jordan claim, and with a large part of the area of the Mountain Gem; and that, too, when it is admitted that the owners of the alleged prior locations made no adverse claim nor protest to the issuance of the senior patents; and when, moreover, it appears on the face of the Jordan and Gem patents that the segment of the lode or vein in question is expressly excepted in those patents in favor of the Kempton and Ashland claims. Thereby, the senior patents, as respects all extra-lateral rights incident to ownership of, and title to the apex of the lode in the excepted area, have been cancelled and annulled.

A senior patent to a mining lode claim can not thus be overridden and displaced. The proposition is wholly destitute of support in any decision, except that which is here under review. For certain it is, that in every case where there are conflicting and overlapping mining lode claims, and the owner of one of them applies for a patent to his claim, and the owners of the other conflicting and overlapping claims fail, after due notice, to adverse, as the phrase is, and the applicant obtains a patent for his claim, from that fact there emerges an *indisputable presumption* that such claim is superior in right, is prior in valid location to the non-adversing conflicting claim, and that such claim has no right, either intra-limital or extra-lateral, against such patented claim.

This is the doctrine and *ratio decidendi* of

Gwillim vs. Donnellan, 115 U. S., 45.

Lavagnino vs. Uhlig, 198 U. S., 443, 455.

Wight vs. Dubois, 21 Fed., 693, 696.

Golden Reward Co. vs. Buxton M. Co., 79 Fed., 868, 874.

Lee vs. Stahl, 9 Colo., 208-211.

Seymour vs. Fisher, 16 Colo., 188, 193.

Jefferson M. Co. vs. Anchoria L. M. Co., 32 Colo., 176, 181.

In Mining Company vs. Tunnel Company, this court says:

"Undoubtedly, if in an adverse suit, the time of any particular matter is litigated, the judgment is conclusive, and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant, and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent and the owner of another seeks to challenge the former's priority of right on account of discovery, it is his duty to bring an adverse suit, and if he fails to do so, that question will be as to him concluded. Such is the purpose and effect of the adverse proceedings."

Mining Co. vs. Tunnel Co., 196 U. S., 337, 355.

The case of the respondent comes within the rule, for the Kempton, the Ashland, the Jordan and the Mountain Gem are mutually overlapping claims. The Kempton is overlapped by the Jordan, the Gem and the Ashland, and the Ashland is overlapped by the Jordan. The owners of the Kempton and Ashland claims applied for and obtained patents of their claims. The owners of the Jordan and Gem claims failed to adverse. Therefore, the *indisputable presumption* is, that they had no "conflict claims" nor adverse rights, either intra-limital or extra-lateral, against either the Kempton or Ashland claims, or they would have asserted them, as required by the statute. Not having done so, neither the then owners, nor their grantee nor successors in title can now assert such rights against the Kempton and Ashland patented titles. The exceptions and exclusions in both the Jordan and Gem patents, in favor of the Kempton and Ashland claims, enforce and confirm, as against the former claims, the right to the segment of the lode within the conflict area, whether it be broad or narrow, and with it all the extra-lateral rights which are incident thereto. To say that this is not so is to take the words of exclusion and exception out of the Jordan and Gem patents. It is to put into the Kempton and Ashland patents words of limitation and exception which are not there.

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2. GRANTING WORDS OF PATENTS.

Consider for a moment the granting words of the Kempton patent:

"Know ye, that the United States of America, in consideration of the premises, and in conformity with the said acts of congress, have given and granted, and by these presents do give and grant, unto said Benjamin M. Du Rell, Lemuel U. Colbath and Isaac Schoenberg, and to their heirs and assigns, the said mining premises heretofore described as lot No. 55, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment, of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of eleven hundred (1,100) linear feet of said Kempton mine, vein, lode, ledge or deposit, for the length hereinbefore described, throughout its entire depth, although it may

enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey, at the surface extending downwards vertically, although said veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits." (Supplemental Record page 11.)

These words of grant are substantially the words of section 2322 of the Revised Statutes of the United States, and which are contained in all lode claim patents. Counsel can not argue the words out of the statute, nor out of the patent. It is by the implied direction of the statute that these words of grant are put in the deed.

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3. WORDS OF EXCEPTION IN JORDAN AND GEM PATENTS.

Again, consider the words of exception which are found in the Jordan and Gem patents. In the Jordan patent they are as follows:

"It being the express intent and meaning of these presents to convey to the grantee herein fifty-two hundred (5,200) linear feet of said Jordan Silver Mining Company's mine, together with the surface ground hereinbefore described, which is not embraced by said surveys Nos. 39, 53, 55, 67 and 69, as represented by yellow shading in the following plat."

(See Jordan patent, plaintiff's Exhibit "U." (Record, page 555.) Also, Jordan plat of territory covered by Jordan patent, opposite page 27 of this brief.)

The exception in the Mountain Gem patent is as follows:

"Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in

said mining claims or lots Nos. 55, 64 and 366, and also all that portion of said Mountain Gem vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot 475 extending four hundred and seventy and thirty-five hundredths feet in length along said Mountain Gem vein or lode; the granted premises in said lot containing sixty hundredths of an acre more or less."

(See Mountain Gem patent, plaintiff's "Exhibit Y" (Record, page 558), and the copy of the patent survey plat, opposite page 27 of this brief.)

The counsel for respondent have made it their chief effort to show that the vein which contains the ores in dispute is a broad lode. Whether it be broad or narrow, the respondent should suffer defeat in this action. For, whether it be one or the other, the fact is incontestable that the Kempton and Ashland claims are laid on the apex of the lode, within the conflict area, and that they have senior patented titles thereto. Assuming that this is a broad lode, in the case of the Jordan, the excepted part covers the whole width of the segment of the lode which lies in Jordan ground, which is excepted as aforesaid. This is very manifest, because the excepted conflict area covers the whole width of the Jordan claim. Therefore, the Jordan claim may be laid out of consideration and discussion altogether, because there is no part of the alleged broad load in Jordan ground, *outside* the excepted conflict area, above the ore body in dispute. Even if there were some part of the apex of the supposed broad lode in Jordan ground, outside the excepted conflict area, and above the ore vein in controversy, the case would not in law be different; but the fact that there is none at all leaves their case, as it respects the Jordan claim, wholly destitute of even plausible support. All that part of the alleged broad lode apex within the surface line of the Jordan claim, upon which an apex right to any of the ore in conflict could be based, was in conflict with petitioners' claims and patented to them.

The exception in the Gem patent excepts the "Mountain Gem vein or lode, and all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside such excluded ground."

4. DOCTRINE OF RELATION NOT APPLICABLE.

The suggestion by counsel that the junior patent goes back by relation to the alleged location of the Jordan and Gem in 1863, and 1864, must be rejected. It is not a case for the application of the doctrine of relation. That was decided in the case of Eureka Mining Co. vs. Richmond M. Co., wherein Mr. Justice Field delivered the opinion, and in which the court, after stating certain conditions under which the doctrine of relation might apply, said, at page 318:

"But this principle has been qualified in its application to patents of mining ground by provisions in the act of 1872 for settlement of adverse claims before the issue of patent under that act, when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from subsequent location of school warrants, or a subsequent purchase from the state, as in the case of Heydenfeldt vs. Dancey Gold Mining Co., reported in the third of Otto, the doctrine can not be applied so as to cut off the rights of the earlier patentee under a later location, where no opposition to that location was made, under the statute. The silence of the first locator is, under the statute, a waiver of his priority."

Eureka Con. M. Co. vs. Richmond M. Co., 4 Sawyer, 302; 9 Morrison Min. Rep., 592.

Morrison's Mining Rights (12th Ed.), 128.

We have called attention, at page 31 of this brief, to the testimony relating to the discovery of the Gem location, from which it appears that the respondent in this case did not attempt to prove an actual discovery upon the Gem claim at any date prior to the location, to the entry, or to the patenting of the Kempton claim, but contented itself with presenting an alleged location

certificate of the Gem claim purporting to have been filed with the recorder of a mining district on the 24th day of August, 1864. There is no evidence in the record to show that any mining district existed at that time, had been organized, or included within its boundaries the alleged Mountain Gem location, nor that this pretended location was made in compliance with any regulations or rules of the mining district upon this subject. The claimed location was made prior to any act of congress authorizing the appropriation of the public mineral domain, and there was no territorial legislation authorizing such action by the laws of the Territory of Utah. There is, then, not only a failure of proof of the facts upon which it may be contended that a location had been made of the date claimed, to which it is attempted to carry back the patent by the doctrine of relation, but there is a failure to make that proof which was essential to permit the introduction of any evidence of the supposed notice of location. An attempt is made to carry a title back of a date when any law, of which the court could take cognizance judicially, authorized the same. The location certificate purports to be made subject to the regulations of a mining district. There is an utter failure to prove that any laws existed for such district, in what district the alleged location was made, or that any acts were done which constituted a compliance with such regulations. The court below could not, nor could the Circuit Court of Appeals, or this court, take judicial cognizance of the supposed existence of the mining district, of its organization, of its regulations, or of a compliance therewith. To have justified or permitted the introduction of the certificate it would have been necessary to prove the organization of a district, its boundaries, the regulations of the miners concerning the location of claims, their extent and the terms upon which they might be appropriated, that this claim was in said district, and that such regulations had been complied with. The notice itself is vague, uncertain and incomplete, and could not be the basis of a valid location. It does not state the mining district in which the location is made. The notice is to the effect that the supposed lode runs south 200 feet to a gulch, and north 1,400 feet from said cut parallel with the Pollock lode. This gave it a direction north and south, whereas the patented claim in the Gem has

an east and west course. The claim purported to have been located is asserted in the notice to be 1,600 feet in length, in a north and south direction. The claim patented is 475 feet in length in an east and west direction. The patent purports to be laid lengthwise of an east and west lode. The notice purports to cover a north and south lode. When its course was changed, whether the ground covered by the patent is in any sense or to any extent the ground covered by the notice, is not shown by any evidence in the record, and assuredly no presumption can be indulged in for the purpose of carrying the patent back to a date prior to the location of a claim which patented so considerable a portion of the Mountain Gem as it has outlined in its own patent as having been located, for the purpose of making it superior to the claim which had successfully asserted its prior right to the conflicting area. The only date mentioned in the patent of the Mountain Gem claim, concerning its existence, is the date of entry, and this was the 31st day of December, 1897. The Kempton patent was issued February 23, 1875. So that the Kempton patent was issued long prior to the entry of the Mountain Gem claim, as shown by its patent. From this fact, and without introducing competent evidence establishing not merely that a notice was filed, but that a valid location was made and maintained, no doctrine of relation could be invoked in behalf of the priority of location of the Mountain Gem, even had there been no conflict of surface betwen the Mountain Gem and Kempton claims, with the results therefrom which we have hereinbefore pointed out and to which we shall again call attention. When the Mountain Gem claim comes with a patent junior by more than twenty-five years to the patent and entry of the Kempton claim, we are but stating the rule mildly when we assert that the burden was thereby placed upon it, asserting that the later patent and later entry were of a claim prior to the claim covered by the earlier patent and earlier entry, to prove by competent evidence all the facts which would establish such prior valid location. When the Mountain Gem patent and the plat included therein and made a part thereof are examined, it will be seen that one-half of the top and all of the incline discovery shaft upon its dip, of the Mountain Gem location, was patented to the Kempton claim. An attempt has been

made, in maps which were introduced by the respondent, among them Exhibits "KK," "S," "T," etc., to designate a discovery shaft in the center of the Mountain Gem, as designated upon those maps. These maps are, all of them, erroneous, in conflict with the patent plat and the calls of the patent, and with the location of the Mountain Gem upon the ground, moving in effect its boundaries some fifty feet south, and thereby relieving the claim, to that extent, of the conflict actually existing between it and the Kempton. This condition and change is here alluded to, for the purpose of pointing out the failure of the respondent to identify what was presented to the court as the present position of the Mountain Gem claim with either the claim as patented or the claim asserted to have been located in 1864. We elsewhere discuss this and other misrepresentations of the facts by the maps of the respondents, upon which maps the Circuit Court of Appeals relied in reaching its conclusions concerning the position of the claims and other important matters.

No proof is introduced of the existence of a discovery of the Mountain Gem claim at the point to which we have alluded as having been marked upon the map as discovery, and the declarations of the patent and its plat both conclusively show that it did not and could not exist at said point, but at a distance of fifty-two feet to the south of that point, and so as to be cut in two by the southerly side line of the Kempton claim as patented. When, in addition to this condition of affairs, it is disclosed by the patent of the Kempton and by the patent of the Mountain Gem, as is the fact, that these two claims were in material conflict, that the Kempton prevailed and secured a patent therefor, and that the Mountain Gem patent expressly excluded and excepted the rights dependent upon the outcrop of a vein relied upon by the respondent as being within this conflict, the case against the attempt to invoke the doctrine of relation is intensified. No principle upon which the doctrine of relation rests calls for or permits its application here. The doctrine asserted by the authorities is one intended to accomplish justice, and not to aid in the perpetration of a wrong or a fraud. The whole theory of its purpose and application would be reversed, if a claim, without mineral within its boundaries justifying its ex-

ploration, as stated by Mr. Holden in his testimony (Record page 368), and without sufficient showing thereof to justify exploration, which was permitted to slumber, according to the theory of the respondent, for more than thirty years, and then to entirely change its direction, and which exhibits in the notice produced the fact that it had been re-located as the Ameer, without any explanation of the disappearance of this Oriental Chieftain, and shrunken from its original dimensions of 1,600 feet in length by 200 feet in width, to six-tenths of an acre, or about one-eleventh of its original dimensions, as stated in the location notice; without any proof of annual labor in all the years that intervened between the alleged location and the entry; without any identification of the course and situation upon the ground of the claim as asserted to have been first located; with all the work upon the claim consisting of a shaft some thirty feet deep to represent work which has been required by the Federal statute, under which it was patented, since 1872, and all that had been done in the eight years between these first steps of location and the enactment of that statute.

The Jordan claim, as to the matter of relation, is in the same position as the Mountain Gem upon the subject of a failure of evidence to establish facts prior to the entry of the claim for the purpose of having the patent relate to the date of alleged location. Mr. Sutherland, in opening his case, in a statement which is set forth at page 25 of this brief, gives the claim of respondent with reference to the Jordan and the doctrine of relation. He refers there to the Jordan claim having been located in 1863, and then mentions it as having been located in 1865. The alleged location notice of the claim is introduced, and is found at page 25 of this brief. It will be observed that the date of the certificate is "September 17, 1873." This notice was therefore filed, according to this record, after the 10th day of May, 1872, and purports to be of a location made at that time, and is fatally defective, in that it violates a number of the provisions of United States mining laws then in existence. The claim is more than fifteen hundred feet in length, and is necessarily invalid as to the excess over fifteen hundred feet. The affidavit of Henry Thompson, recorder of West Mountain Mining District, which sets forth

that the copy of this notice is found at page 305 of the record is correct, was made on the 13th day of October, 1873, and the thus verified copy of the certificate was filed for record October 13, 1873, at 3 P. M. (Record, page 308) and the certificate of the copy was made the 13th day of November, A. D. 1876.

The patent of the Jordan claim was issued the 14th of July, 1877 (Record, pages 556, 557); the entry of the claim, as recited in the patent, was made on the 8th day of June, 1877. (Record, page 552.) There is an utter failure of proof on behalf of the respondent to establish any of the acts of location of the Jordan claim. There is no proof of the existence of a mining district, of the regulations of miners, of a compliance with those regulations, or any acts which permitted the making of a location prior to May 10, 1872. If, as is asserted, the Jordan claim was located in 1863 or 1865, there is no proof of the acts of such location, nor of any act which constitutes a part of such location. The respondent seems to have proceeded upon the theory that, by producing a certified copy of a purported location certificate of the Jordan and Mountain Gem claims, respectively, it established the location, and justified and required the application of the doctrine of relation to the patent, carrying back the validity of said claim to the date of said location notice, the asserted date of location. The case stands different from what it would have been had location certificates been filed after the 10th day of May, 1872. At that time the federal law made certain requirements concerning a location, chief of them that there should be the discovery of a vein within the boundaries of the claim, and then provisions concerning the marking of the boundaries, and in the event that a record was made, that it should conform to the requirements of that legislation. (Act of Congress, July 26, 1866; 14 S. L., 25.) It might be said, of a claim located after May 10, 1872, with reference to which it was proved that the acts required by the statute had been performed, that it was not necessary for the claimant to prove there was no mining district and no mining regulations, and therefore he was not required to do any acts for the purpose of complying with them, nor, on the other hand, to prove that there was a mining district, mining regulations affecting, within the provisions of the federal statute, the location of claims, and

that he had complied therewith. We assume, for the purposes of this argument, that it might be taken for granted that the court would treat a location proved to be well made, so far as the requirements of the federal and state statute, of which the court had judicial cognizance, were concerned, although no evidence whatever was introduced upon the subject of the existence or non-existence of mining regulations. But when an attempt is made to carry a location back of the date of the first federal statutes and territorial statutes authorizing and regulating the making of mining locations, so that no warrant therefor and no means of testing the sufficiency of the alleged acts of location exist, unless it be by virtue of local regulations adopted in their primitive legislations by the miners, in districts acting under the supposed tacit license of the United States government upon that subject, nothing can be assumed or presumed or known by the court as to the existence of such a district, the making of such regulations, the authorization of any location, or any right whatever to rely upon the privileges and rights secured by these local regulations. In such case, since these local regulations are and must be the only basis of the right, he who asserts a title founded upon a supposed compliance therewith, must prove the regulations, the existence of a district in which they are made, and then a compliance therewith. He can not be at liberty to make an assertion self-serving in its character, *ex parte* in its nature, that he has complied with the unproved, unknown regulations. He assuredly can not make this proof by simply filing an unsworn notice, in which reference is made to the purpose of complying with the unstated and unknown regulations of an unnamed mining district, the existence of which is nowhere proved. In this particular, the position of such claimant can not be better than that of a claimant who undertakes to prove the location of a mining claim under the laws of congress and of the state, and who, either for the purpose of invoking the doctrine of relation or of establishing, as he must do for that purpose, the acts of a location, so as to carry back the existence of his claim beyond the recitals of his patent. He, we maintain, can use his location certificate for the purpose of proving that this act, to wit, the filing of the location certificate, has been performed; but he can not, by the ex parte recitals of the certificate, prove that he had made a

discovery, set the stakes, or had done the other acts required by the law to be performed for the purpose of making the location. If a location certificate, authorized by statute, can not be given such force and effect, then how can the production of an alleged notice, for the making of which no authority whatever is shown, have a greater effect? Can the voluntary filing of an ex parte statement by a locator in his own behalf, be taken as the establishment of a right, without proof of some legal authority, some right by regulations or statute, to acquire title by this means? It seems clear that even were the respondent at liberty, in view of his refraining from testing the superior and prior rights of the Ashland and Kempton claims to the area in conflict, to now assert against the prior entries and patents of those claims the priority of location of the Jordan and Mountain Gem claims, that he can only do so when he proves, by competent and satisfactory evidence, the performance of those acts which the law required to be done in order to constitute such valid location, and that when he goes back into the dim past, beyond the first legislation of congress upon this subject, to find a right there, he must prove all that he did, and as well the rules and regulations which gave him an authority thus to proceed. Is his mere statement in his own behalf sufficient, his assertion in his own behalf, in this informal manner, to be taken as proof of the legal conclusion that he had complied with the law, without any opportunity being given to the tribunal, sitting to try the question, to ascertain whether this assertion is true or not? In all such cases, the facts which are claimed to constitute a compliance with the custom must be proved, and the custom itself must be established by legitimate evidence. Both of these essential elements of proof are absent in this case. The Circuit Court of Appeals, in Uinta Tunnel Mining and Transportation Company vs. Creede and C. C. Mining and Milling Company, 119 Fed. Rep., 164, at page 169, said:

"But the certificates of location are not conclusive proof of the facts which they recite, against those asserting rights adverse to their makers. They are competent evidence of the fact that they were made and filed, and hence of an important link in the chain of the plaintiff's title; but when the existence of facts which they recite is challenged, they are but the *ex parte* statements

of interested parties, and there is nothing in them or in their relation to the property of the parties, to bind those claiming the lands adversely to their makers, or to estop them from establishing the truth by the customary oral and written evidence."

It was only necessary for the court, in that case, to go to the extent of holding that the question was open for investigation upon evidence; but the statement of the rule necessarily carried the decision, which was proper in that case, that all that was proved by the location certificate was its contents, its execution and its filing, and not the existence of any facts therein narrated or recited. Nothing in this case has been proved to show that the mining regulations authorized a location certificate, or that it permitted one to be made, or that the making of it constituted any part of a location whatever.

In Sullivan et al. vs. Hense et al., 2 Colo., 424, we have a discussion of what must be shown for the purpose of establishing a location of a lode mining claim, prior to the enactment of the United States statutes upon that subject. Judge Hallett, delivering the opinion of the court, at page 429, says:

"The manner of locating a mining claim upon the public domain, and of conveying title to the same, was then regulated by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district."

After referring to the act of Colorado of November 7, 1861, giving effect to such rules, usages and customs, the court says:

"The validity and force of such rules, usages and customs has also been recognized by congress (13 Statutes at Large, 441; 14 Id., 251; 17 Id., 91), and by the Supreme Court (Sparrow vs. Strong, 3 Wall., 97), by which they are established, without doubt or question. We may, therefore, assume that a valid location of the claim in dispute could have been made in the year 1860, only according to the rules, usages and customs of miners in Illinois Central District, where it is situated, prevailing at that time, and it is important to determine in what manner such rules, usages and customs are to be ascertained. To say that the court is advised of the nature and extent of such regulations is contrary

to the fact, and, therefore, they can not be the subject of judicial notice.

"In California, provision is made by statute for introducing proof of such regulations at the trial (Code of Prac., section 748), and so the practice has been with us from the earliest time. No other course can be pursued, and no good reason is perceived for adopting a different rule. That it may work hardship, in cases where the proof is difficult, or impossible to obtain, is readily understood, but as such proof lies at the foundation of the title, it is impossible to dispense with it. What this evidence shall be, must depend very much upon the circumstances of the case, and it would be difficult to frame a general rule upon the subject. It is well known that in most of the mining districts, rules governing the location and transfer of claims were reduced to writing, and preserved in the records of the district, which were afterwards deposited in the office of the county clerk and recorder. In some instances the regulations were printed in pamphlet form, and copies of such pamphlets may be found; in others, no record of them remains, and resort must be had to the testimony of living witnesses, or to other evidence to establish them. * * * No effort was made to show what was necessary to be done in locating a claim in that district, or that anything was done according to the local regulations. It may have been necessary to sink a shaft upon the claim, or to define the location, by monuments or in some other way. We can not assume that a certificate of location, on the records of the district, was all that was necessary to make a valid title to a mining claim, or indeed that the certificate itself was made according to the local rules of the district. The evidence should show the essential features of a good location in that district, and that Wilson made such a location of the claim in dispute. So, also, the deed from Wilson to Goldsberry, dated October 5, 1861, was not shown to have been executed according to the rules and customs of the district, nor was there any proof of the execution of it. In the 15th section of the chapter relating to conveyances (Rev. Stat., 109), provision is made for proving the execution of a deed attested, as was this one, by subscribing witnesses, and the appellees could have pursued that method if they desired to avoid the necessity of proving the rules and customs of the district; but it was necessary to prove the execution of the deed in some way. It is true that the statute declares that the records of mining districts shall be taken as evidence in the courts (Rev. Stat., 466), but this can not be extended beyond records made according to the local rules and customs of the district. It would be absurd to suppose that the legislature intended to give validity to every instrument which may have been placed upon the records contrary to the local laws and customs of the

district, for in that way those laws and customs which the legislature had always sought to perpetuate and enforce would be ignored and nullified. Therefore, it was not enough to show that the deed from Wilson to Goldsberry was found upon the records of Illinois Central District, but proof of the local rules and customs regulating the transfer of mining claims should have been offered in order that it might appear that the deed was executed conformably to those rules and customs, or failing in that, proof of execution should have been made under section 15 of the chapter relating to conveyances."

C. R. M. M. Co. vs. Lebanon M. Co., 9 Colo., 343. At page 344 the court says:

"Mr. Justice Field, speaking the unanimous view of the Supreme Court of the United States in Jennison vs. Kirk, 98 U. S., 453, with reference to these miners' regulations and customs in California, uses the following language: 'They all recognized discovery, followed by appropriation, as the foundation of the discoverer's title, and development by working as the condition of its retention.' We think this remark equally true of the rules and customs existing in Colorado prior to statutory enactment on the subject. It is hardly possible that a custom ever prevailed with miners which recognized the right to possession of a lode or lode claim, for an indefinite period, without actual occupancy or some kind of development work. To say that merely posting a discovery notice on the crevice, and recording a certificate stating metes and bounds, constituted such an appropriation as, for a considerable period, prevented another from taking possession and developing the lode, is to recognize a custom that can hardly be considered reasonable—a custom contrary to the usual experience and practice in appropriations of the public domain and incompatible with ordinary sagacity and appreciation of justice among miners themselves."

Becker vs. Pugh, 9 Colo., 589. In this case the court points out the miners' regulations of Gregory District adopted in 1860, and which were proved in the case, and at page 592 says:

"Authorities, other than the federal statutes themselves, need scarcely be cited to establish the proposition that, in order to constitute a valid location, compliance with miners' rules and regulations in force at the time, as well as with statutes on the subject, is essential; but counsel are cited to Sullivan vs. Hense, 2 Colo., 424, and Consolidated Republican Mountain Min. Co. vs.

Lebanon Min. Co., ante, page 343. It was necessary for plaintiffs in this case to establish a compliance with the miners' rules and regulations in force at the time the claims described in the complaint were located."

Meydenbaur vs. Stevens, 78 Fed., 787.

While we may not assume what the necessary regulations were, we have pointed out that universally discovery and work were essential elements to a valid location, and that even if the regulations were made authorizing a location without discovery and work, it would have been unreasonable and rejected by the courts. Justice Field, in Jennison vs. Kirk, 98 U. S., 453, gives an interesting and graphic history of such regulations, and points out what were universal requirements concerning locations under the miners' common law. It is held that, while a location certificate is not required by the United States statutes, nor by the statutes of all the states, yet in those states in which it is required it is in itself only prima facie evidence of its own existence and filing.

2 Jones on Evidence, section 521.

Campbell vs. Rankin, 99 U. S., 261.

Jantzen vs. Arizona Co., 20 Pac. Rep., 93.

Pollard vs. Shively, 5 Colo., 309.

The necessary purpose of a location certificate, or location notice, is to notify others of what has been appropriated and to perform one of the acts of location.

1 Lindley on Mines (2nd Ed.), sections 391, 392.

"Sec. 392. The Record as Evidence. Constructive notice by recording is wholly a creature of the statute. A record not provided for by statute or recognized by law gives no notice. Therefore, before a record of a mining location can be introduced in evidence for any purpose, it must appear that it is authorized by law; otherwise, it is irrelevant and inadmissible.

"Where such record is authorized, it is prima facie evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. A record of a certificate of a location which recites the citizenship of locators, the fact of discovery, and the fact that the location had been marked upon

the ground so that the boundaries could be readily traced, is not evidence of any of these facts in any of the states or territories, for the simple reason that no such facts are required to be stated in any of the statutory notices.

"Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location."

Roberts vs. Wilson, 1 Utah, 292.

Harvey vs. Ryan, 42 Cal., 626.

Moxon vs. Wilkinson, 2 Mont., 421.

Golden Fleece M. Co. vs. Cable Cons. M. Co., 12 Nev., 312.

Strepey vs. Stark, 7 Colo., 614.

Flick vs. Gold Hill & L. M. Co., 8 Mont., 298.

That the facts in this case do not warrant the application of the doctrine of relation, independently of the objections we have just presented to the possibility of its application, is clear, for the result would be, not justice, but injustice, and would accomplish a most serious and unwarranted wrong.

In Evans vs. Durango Land and Coal Co., 25 C. C. A., 532, referring to the doctrine of relation, the Circuit Court of Appeals for the Eighth Circuit said:

"It may be conceded that a patent for public land, has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of some other equivalent act, such as the surrender of a land warrant, or the selection of land to supply an ascertained deficiency in a land grant. * * * The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would

otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect."

Gibson vs. Choteau, 13 Wall., 100.

Newhall vs. Sanger, 92 U. S., 766.

Redfield vs. Parks, 132 U. S., 249.

Hussman vs. Durham, 165 U. S., 148.

Small vs. Westchester Fire Ins. Co., 51 Fed., 795.

Hankins vs. Harlan, 68 Cal., 238.

Grant vs. Iowa Land Co., 54 Iowa, 677.

Ellis vs. Pomeroy & Co., 1 Wash., 576.

It is, then, a fundamental error in the decision of the Circuit Court of Appeals, if we have maintained the proposition we have above asserted, that it gives an all-controlling effect to these alleged prior location notices, and subjects the prior patents to the supposed priority established by them.

5. THE SENIOR KEMPTON AND ASHLAND PATENTS CONCLUSIVELY PROVE AND DETERMINE THE PRIORITY OF DISCOVERY AND LOCATION OF THESE CLAIMS OVER ALL OVERLAPPING AND CONFLICTING CLAIMS, AND SPECIFICALLY THE JORDAN AND MOUNTAIN GEM CLAIMS.

The issuance of the patents to the owners of the Kempton and Ashland claims in 1875 determined that they were located prior to the overlapping Jordan and Gem claims, in any controversy thereafter arising, where the fact of priority of location might be called in question. It also conclusively determined the immunity or exemption of the title of the Kempton and Ashland claims, from all adverse claims whatsoever, which the owners of the Jordan and Gem claims might have asserted before the issuance of the patents, whether such adverse claims be priority of location, a claim of extra-lateral rights over the Kempton and Ashland claims, or other adverse claim; and the patents themselves are conclusive evidence of such priority and exemption.

As respects the question of presumptive priority of location, the law is stated in Lindley on Mines, thus:

"Therefore, the patent itself is conclusive evidence of priority in cases where the question either actually was or might have been adjudicated in the patent proceedings. So it would seem that where an adverse claim is filed, showing any surface conflict, the judgment rendered in the action upon the basis of which the patent ultimately issues, is conclusive in its effect, not only as to the surface area directly involved, but determines priority in favor of the successful litigant as to all rights flowing from the respective locations. The question of priority having been actually or presumptively adjudicated as to one part of the conflicting claims, the judgment necessarily extends to and affects the portions not included within the conflict area, and a subsequent conflict of underground rights arising in such a case must be determined by the priorities actually or presumptively established in the patent proceedings."

Lindley on Mines (2nd. Ed.), Vol. 2, section 783.

It is denied that there is any authority for the foregoing statement by Mr. Lindley, and that he has referred to no decision in support of it except the Last Chance M. Co. vs. Tyler, 157 U. S., 683. This is an error. The decision in that case well supports the text in Lindley. For the case was, that the owners of the Tyler claim applied for a patent. The owners of the Last Chance claim filed an adverse claim, and then brought their suit in a court in Idaho. In their complaint, they alleged that the Last Chance claim was located before the Tyler claim. The owners of the Tyler claim *made default* by withdrawing their answer to the complaint. Their default was entered, and the owners of the Last Chance claim then applied to the court for the relief demanded in their complaint, to wit, a finding by the court that the Last Chance claim was located prior to the Tyler claim, which finding was made by the court, and judgment was entered thereon accordingly. In a subsequent suit between the successors in title of those parties, this court decided that the question of priority of title had been determined by that judgment, and could not be re-litigated in a later suit. This was in an apex suit, where the conflict arose in the assertion of extra-lateral rights upon a vein not apexing in the conflict. No difference in principle is perceived between that case and this. There the judgment was by default, in a court of law, as a part of the special proceedings provided by section 2326 of

the Revised Statutes concerning the area in conflict between the two claims. Here the judgment was by default in the United States land department in the special proceedings provided by section 2325 of the Revised Statutes concerning the area in conflict. The owners of the Kempton and Ashland claims applied for patents for the part or segment of the lode in controversy and the surface ground covering or embracing the same. The owners of the alleged prior Old Jordan and Mountain Gem claims *made default*. They did not answer the application for the patent by making an adverse claim. Thereupon the owners of the Kempton and Ashland claims made the proper entry in the general land office, and demanded the usual adjudication in such cases under the provisions of section 2325, to wit:

(1) That there was no adverse or conflict claims existing in favor of the owners of the Jordan or Gem claims, or in favor of any one else in the world, by reason of priority of location of the same, or other[illegible]e, to the part or segment of the lode applied for, over or against the right to possession thereto, of the owners of the Kempton and Ashland claims.

(2) That the owners of the Kempton and Ashland claims had the present right to the possession of the part or segment of the lode applied for, and the lateral rights and surface ground incident thereto, and the right to receive from the United States a patent therefor; and thereupon the land department entered such judgment, and the United States, exemplified and executed it, by issuing their letters patent aforesaid to the owners of the Kempton and Ashland claims.

Therefore, the decision in Gwillim vs. Donnellan, Last Chance vs. Tyler, Lavignino vs. Uhlig, Wight vs. Dubois, and the text in Mr. Lindley's work, and the reasoning of this brief, all stand on exactly the same principle, namely, that a man can not be heard to say that he has a better right to a lode in virtue of priority of location thereof than has a senior patentee thereto, when he has had an opportunity to be heard on that question and has remained silent.

The essential foundation of respondent's claim is that it has priority of title to the broad lode by virtue of a prior location thereof, and that this right entitles it to take the entire vein, not-

withstanding in fact a very considerable portion of this same apex is in another claim, with which it had a controversy as to said portion, and in which controversy it was determined that the other claim had the older right. Can it be that its claim to a part of this vein for the purpose of giving apex rights, as though it had all of it, can be sustained upon a doctrine of prior right, when that very question was fought out as to the other portion of the vein, and it was determined that the other claimant had the prior right thereto? In other words, the remarkable proposition is presented of the respondent claiming that its title to the half of the particular apex which was not in conflict was by virtue of an older location than that by means of which it asserted a title to the remainder of the same apex, which was within one claim and based upon the same identical location.

By the proceedings in Last Chance vs. Tyler, the question of priority of location was determined upon a default by the judgment of a court of law. Here the matter has been in effect and with the same presumptive force and extent determined upon default by the proceedings in the United States land department, which resulted in the issuance of the patents.

The case of Bunker Hill, etc., Mining Co. vs. Empire, etc., Mining Company, generally known as the Stemwinder case, 109 Fed., 538, and the same case in 114 Fed., 420, is a decision which establishes that priority of location between locations conflicting upon the surface determined in the patent proceedings, where no adverse claim is made or suit is filed, as to conflicts or apex rights where priority of location determines the contention.

The decision in the latter case was made upon great consideration; it is referred to in Lindley on Mines, and fully bears out the text of the learned author on the point under notice.

From the statement of the case, it appears that the question in the Stemwinder case was first decided in 109, Federal Reporter, 538. That afterwards a petition for a rehearing was granted, and the Ninth Circuit Court of Appeals, after re-argument, adhered to and reaffirmed its former decision, as follows, at page 421:

"A careful re-examination of the questions considered in the opinion of the court above cited satisfied us of its correctness,

although to avoid the misconception of that opinion taken by counsel for the then plaintiff and present defendant in error, and make it more clearly express its meaning, we here so alter the clause of the opinion, as reported at the top of page 547 of volume 109 of the Federal Reporter, and page 674, 48 C. C. A., as well as the original, as to make it read as follows:

"'The application for the patent for the Last Chance was, as has been seen, for the whole claim, as indicated in the diagram hereinbefore set out, and carried with it, as has been said, the implied, if not the expressed, allegation that the location was made upon land at the time open to location, and was therefore prior to any location thereof by any one else. The issuance by the government of its patent, after due notice to all the world of the application, and ample notice to every one to contest it, conclusively determined, as against every one whose surface lines conflicted therewith, the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but as against every one whose surface lines conflicted with those of the Last Chance, the extralateral rights conferred by section 2322 of the Revised Statutes, to follow on their dip outside the side lines, and within vertical planes drawn through the parallel end lines extended in their own direction, all veins, lodes, or ledges, the tops or apexes of which lie inside the surface lines of the claim.'"

Empire State-Idaho M. Co. vs. Bunker Hill Co., 114 Fed., 420-1.

This luminous statement is a determination of the exact legal question which is here under consideration.

The declaration of this court in Mining Company vs. Tunnel Company, 196 U. S., 337-355, above set forth, is a direct affirmation of the doctrine of the Stemwinder case.

Again, in the case of Jefferson M. Co. vs Anchoria-Leland M. Co., there were two lode claims called the Anchor and the Mattie L. The anchor applied for and first received its patent, and no protest or adverse was made thereto by the owners of the Mattie L. On such state of facts the Supreme Court of Colorado said:

"Had the owners of the Mattie L. protested the application for patent of the Anchor and brought their suit in support of

such adverse claim, and the judgment of the court in which the suit was pending had been in favor of the Anchor, this would have been a conclusive determination that the latter *is the senior location*. Such a judgment of the court would be no more conclusive than the determination of the officers of the land department, in the absence of such protest, that the Anchor was entitled to a patent for all of the territory within its surface boundaries, including the strip covered by both locations."

Jefferson M. Co. vs. Anchoria L. M. Co., 32 Colo., 176, 182.

That the issuance of a patent to a mining lode claim conclusively establishes the priority of the location of that claim over an overlaping or conflicting claim, is a corollary of the proposition affirmed by this court, that when a patent is issued to a lode claim "there arises an *indisputable presumption* that no conflict claims exist."

Lavagnino vs. Uhlig, 198 U. S., 443, 445.

The one proposition is the natural or logical result of the other. The special matter which counsel for respondent have contended and no doubt will contend takes their case out of the foregoing interpretation and application of the statute is, that this is a broad lode, that a patent is not conclusive against conflict claims, unless the *entire width of apex* of the lode is inside vertical planes of the exterior surface boundaries of the patented claim. No statute nor authority is given for this assertion; it is said merely that the law is so.

Counsel for respondent contends, and Judge Vandeventer, in delivering the opinion of the Circuit Court of Appeals in this case, held, that the fact that the Ashland and Kempton claims had secured patents for the area in conflict between those claims respectively and the Jordan and the Mountain Gem claims, covering the entire width of the alleged broad lode in the Jordan, the greater portion in the Mountain Gem, and in each instance patenting the entire width of the real lodes actually found in the ore veins, to wit, the Ashland and Kempton, in no manner affected or passed upon the question of priority of location between these claims. An attempt is made to support this contention by a

reference to the language of Mr. Justice Brewer, in delivering the opinion of this court in the case of Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683. It is therefore proper for us now, in addition to citing the numerous cases we have called to the attention of this court holding with singular unanimity exactly opposite views to those expressed by the Circuit Court of Appeals in this case, and citing and relying, in their decisions, upon Last Chance Mining Company vs. Tyler Mining Company, to investigate the underlying principles which necessarily controlled that decision, and which, we maintain, are involved in this.

Judge Vandeventer proceeds upon the theory that a determination may be made concerning an area in conflict between two hostile locations in adverse proceedings under the Federal statute, upon some other ground than that the successful claimant is the prior locator, and that if this is true, it follows, in every case where a patent has been issued and an affirmative showing is not made that the determination was based solely upon the ground of priority, that the priority did not exist, or at least that the defeated contestant for the ground in conflict may nevertheless have the prior claim, and is not affected in his assertion of that contention by the issuance of the patent. This theory is clearly in antagonism to the authorities we have cited, and to the now accepted and well settled view of the subject, found not only in the decisions which we bring to the attention of this court in this brief, but to many other cases which have not been reported, and in the well considered and carefully framed enunciation of the doctrine contained in the standard works of authority, written by experienced, able and learned writers upon the law of mines. Just what other controversies this court had in contemplation, when it suggested other matters might be determined in an adverse suit, we are not advised, but this much is clear, that when one of two conflicting claims secures a patent to the conflict, it has done so because it has in fact a superior title thereto, because it has a prior valid location of this ground, or else, the claimant of the other location has waived his prior location by a non-compliance with the requirement of the statute concerning adverse claims, with the necessary result that this waiver induces an

adjudication in effect the same as follows the express determination of the priority of the contending location in an adverse suit. It must be that the successful claim has the prior valid location of the ground in controversy in the eyes of the law, for if not, upon what other ground would it be awarded to it? The uncertainty surrounding the title to valuable property, consisting of mining locations upon the public mineral domain, induced the enactments contained in the mining statutes of May 10, 1872, authorizing the purchase of the claims from the government and provided machinery connected therewith which resulted in the necessary ascertainment of title, and put beyond controversy all questions affecting the priority of right thereto between the claimant applying for a patent and all those who might, or by the statute are required to, assert their adversary claims thereto. This beneficent purpose of this wise and salutary legislation is made frustrate if, after an applicant has applied for his patent and obtained all the ground in conflict with other locations, and especially those asserting priority in discovery and location, and either by the adjudication of the courts or as a result of the failure of the conflicting claims to oppose his proceedings he obtains a patent, and then, when an important right, which is specially mentioned in the patent issued and is by the statute expressly declared to be thereby conferred, is brought into dispute, to wit, his right to follow his vein upon its descent into the earth, he may be successfully told that this incident of his ownership, this material part of his location, this main object of his grant, is open to attack upon the ground that the claim, which did not dare to or care to contest his assertion that he had a prior valid location as against all the world, as against those who made some pretense of having made an earlier location to all the ground within his claim, was in fact an earlier location, complete in the performance of all the acts giving it seniority in title, and therefore had the right to take from him the ownership of the vein contained in the very ground, as to its apex, which had, by operation of law, been adjudged his as against the non-adversing conflicting claim. The disastrous results and the great injustice which would be inflicted by this doctrine, in our opinion, with due deference submitted, is well illustrated in the present case. The Ashland claim asserted

this prior right, by virtue of the first valid location thereof, to all the surface ground included within its surface boundaries, and of all veins having their tops or apexes within this surface ground. This assertion brought it directly in conflict with the Jordan location, since the two claims crossed each other and had a conflict, consisting of a parallelogram the width of the Jordan in one direction and the width of the Ashland in the other. In this conflict area there was contained the entire width of the lime belt claimed to be the broad lode upon which the respondent relies. There was also contained in this same area, in length the full width of the Jordan claim, the apex of what is designated in this proceeding the "Ashland fissure vein." The patent for the Ashland claim grants this disputed area and all the veins having their tops or apexes therein, and confers the right to follow them upon their dip into the earth as far as they may extend. There was, then, a controversy between these two claims as to which of the locations owned this area and the veins apexing therein. Upon what, necessarily, did these respective assertions rest? The mining laws gave to each locator the right to locate the unappropriated mineral domain of the United States, but no right to locate any territory which was covered by a prior existing valid location. If the Ashland claim was entitled to this area, it was because the assertion of prior location by the Jordan was unsustained, and because the Ashland was the first valid locator thereof, or else, because by the failure to adverse the assertion of prior location, necessarily made by the Ashland in its application for patent, the Jordan admitted, conceded this assertion, in the most effective manner possible, by failing to adverse it, with the announced result in the statute, that by so doing any claim of priority of right therto was thereby waived. Let it be asssumed, for the purpose of illustrating the effect of this principle, that the end lines and side lines of the two claims are so laid that a conflict exists underground between their respective assertions of extra-lateral rights, by the Ashland upon the ownership of the conflict area patented to it, and by the Jordan upon another portion of the outcrop of the same vein, later patented by it as a part of the same location, which originally included the area patented to the Ashland claim. May the owners of the Jordan say, It is

true that we did not adverse your application, that we were aware of your assertion, in the manner provided by law, of your superior and necessarily prior location of the ground in conflict, of your claim, thus made, that the Ashland, as to valid location, was prior in time to the Jordan location, and we did not care to enter into a controversy with you upon that proposition in the manner pointed out by law, but abstained from so doing, well advised of the consequences attached to this failure, by the express provisions of the statute and by its manifest purpose, nevertheless, now, some twenty-five years since we declined to accept your challenge to investigate and settle this controversy, and nearly forty years after the date when we now assert we had made a location, and after you had proceeded in reliance upon your rights and the security of the title guaranteed by the patent of the United States, and when, as the result of your explorations and operations, at large cost, through all these years, you have demonstrated the existence of large and valuable bodies of ore, we will now assert that as a matter of fact our location was first, and we, notwithstanding your patent, are at perfect liberty to go into evidence concerning the remote transactions involved in the location of these claims, and take from you the very life and value of the grant attested by the patent of the United States? How may it be shown, in any case where a conflicting claim abstains from adversing the application for patent, that in fact there was determined thereby that the patented claim was a prior location to the non-adversing conflicting location? May a locator be freer to agitate questions of this character if he utterly fails to make an adverse, than if he unsuccessfully makes it by proceedings in court, wherein he asserts and fails to establish his prior location, or wherein he makes default after legal proceedings are instituted? All those familiar with the administration of this statute, and the courts, with no dissenting voice, until the decision in this case by the Circuit Court of Appeals was announced, have put the patent rights, secured upon a judgment in adverse proceedings, upon exactly the same footing as the right secured by a patent where no adverse proceedings were instituted. That these rights should thus be equally as extensive, as comprehensive and conclusive in the one case as the other, is the manifest, we may say the express, provision of the

statutes themselves. Is it not true, as a legal principle, that the failure to assert a right, when the law provides that this failure shall be a waiver of it, is as disastrous to that right as an assertion of it and an adjudication that it is not well founded? By section 2325, United States Revised Statutes, it is provided:

"* * * If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days' publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. * * *".

This statute provides that it shall be assumed that the applicant is entitled to a patent. This means, is conclusively assumed to be entitled to the patent; and to be entitled to the patent he must be, as against all the world, the holder of a valid location of the territory embraced within his claim, and this he can not be if there is, in the eyes of the law, a prior location covering the same territory. The world is advised, the locators of conflicting claims are notified, that the result of a faifure to adverse will be a judgment rendered against them to the effect that the applicant is entitled to a patent, with all the incidents and rights connected therewith; not only this, but that no adverse claim exists; that no valid right in any one else, based upon an earlier location, exists; or, if it existed up to that point, shall thereafter no longer exist or be recognized, because ~~the determination of~~ its existence is by statute required to be asserted, so that it may then and there be fully investigated and finally determined.

Again, in section 2326, United States Revised Statutes, it is provided that if an adverse claim is filed, it shall be done in a manner therein provided, upon oath, and shall specifically declare the nature, the boundaries and the extent of such adverse claim, and that upon the filing of such affidavit, "* * * all proceedings except the publication of notice * * * shall be stayed *until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.* It shall be the duty of the adverse claimant, within thirty days after filing

his claim, to commence proceedings in a court of competent jurisdiction, *to determine the question of the right of possession*, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim * * *." If the adverse suit is fought out, the claimant securing a judgment that he is entitled to the possession of the ground in dispute, of course by virtue of his location, shall take this judgment as the basis upon which a patent shall be issued to him; or, if the adverse claimant shall not institute his suit, a patent shall issue; but the result, under the statute, in each of the three cases, where there is a failure to file an adverse claim, where an adverse claim is filed and there is a failure to proceed with an adverse suit, and where there is a judgment for the ground in dispute, is that a patent issues granting the ground in dispute to the patentee, giving, in such instances, the same rights and the same incidents as a result of that conveyance. It would result in the gravest confusion, and in most serious injury, if, after a patent has issued for a lode mining claim, as a result of any one of the three conditions pointed out and provided for by the statute, in order to determine what is conveyed by the patent, an investigation outside of the proceedings must be made, and a resort had to the testimony of witnesses, instead of to the terms of the patent itself. The very object of this proceeding is to end all controversies which might possibly exist concerning the ground in dispute; and to make an unassailable title in the patentee as to all veins apexing in said claim, both as to said apexes and said veins upon their dips, as well as to the surface.

By failing to adverse the applications for patent of the Ashland and Kempton claims as to the ground in conflict with the Jordan and Mountain Gem claims, the owner of the latter claims waived all claim to priority of location of those claims over the Ashland and Kempton; conceded, as a matter of law and for the purposes of complete estoppel, and as effectually as though there had been an express adjudication in a court of competent jurisdiction, with the parties before it, that the Jordan and Mountain Gem claims to the ground in conflict was inferior, was junior in valid origin, to the claim on behalf of the Kempton and Ashland; resulted in an effect which stands as an adjudication, not only

that these claims were superior, as to the ground which was in immediate conflict and all rights arising out of it, but as to the entire claims thus in conflict, and hence that the claims patenting the conflict, being superior, were necessarily prior; and if each had a vein, or a portion of a vein, apexing within its lines and carrying extra-lateral rights which conflicted upon their descent, the patentee of the conflict had the superior and prior claim and would prevail in such controversy. The Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683, was an apex case, in which the rights of the parties turned upon priority of location, and involved the effect of a judgment in adverse for the ground which had been in conflict between the two claims in dispute over extra-lateral rights, and where the ground in conflict contained no part of the apex in either claim. The adjudication then was, that as to this conflicting portion of the two claims, one had the prior location. The case did not discuss, did not investigate, the rights of the two claims as to the portions thereof not thus in conflict. It is true that there had been an assertion in the complaint of a priority of location, and this was a necessary assertion, and made in all cases where the complainant seeks to obtain a judgment for the ground, because he can only be entitled thereto if he has the prior or superior location of this conflict. When the court determined, as we insist was done by the issuance of the patents in this case, that the patented claim had a prior location to the conflicting area, the result which was attached to this determination was that the successful claim was prior as a location to the defaulting claim, not merely as to the ground in conflict, but as to a conflict upon the dip of the vein the apex of which in each claim was in territory never in dispute between them; the effect being that an adjudication, express in its character, or where the matter is now shown to have been expressly decided, when it is a necessary basis for the judgment, by default or in the litigation, or in a proceeding for patent in the interior department, where no adverse is filed or where the adverse is abandoned, the determination is not limited to the mere ground in conflict, but affects the respective priorities of the entire claims as to their date of location, the result being that those concerned

are affected, as was said in Last Chance Mining Company vs Tyler Company, in these words, at page 696:

"We are clearly of the opinion that this can not be tolerated; that the judgment was in all respects regular; *that it was conclusive as to the particular ground in controversy, and binding by way of estoppel as to every fact necessarily determined by it, and that priority of location was one fact so determined.*"

If there can be degrees of conclusiveness in determinations of this kind, then it is surely as great where the very thing in conflict was an apex of the lode in question, as where it was simply portions of the surface not including such apex.

In Seymour vs. Fisher, 16 Colo., 188-192, the court said:

"It is a matter of such grave importance as to have become the settled policy of the general government that all controversies relating to conflicting mining claims be, so far as possible, adjudicated prior to patent. The statutes providing for adverse proceedings in the land office, and adverse suits in the courts, conclusively recognize this importance and express this policy. They do not deprive the locator of his interest, nor do they necessarily lessen its completeness and value. They simply point out a particular method by which he is to assert his priority and maintain his advantage. The government, being the paramount owner of the soil, gives the prior claimant fair and adequate notice that he must assert his interest in a certain prescribed manner. If he does not avail himself of the proceedings thus provided for him, the superior advantages obtained by virtue of his priority of discovery and compliance with the location statutes may be lost. Failing to invoke the statutory remedy given and permitting his adversary to secure a patent covering his location, or a part thereof, he will be treated in law as having waived his prior superior rights. Lee vs. Stahl, 9 Colo., 208.

"The existence of a valid and subsisting location of the 'American Flag' at the time of the patenting of the 'Tiger' lode, even if the priority of such location be conceded, did not *ipso facto* protect plaintiffs. The principal purpose of adverse proceedings is to determine just such controversies as arise upon conflicting claims of this kind. Plaintiffs' prior valid location, if such they had, did not exonerate them from the duty of invoking the remedy given by the adverse statutes."

Counsel do, however, refer to the decision in Empire State-Idaho M. & D. Co. vs. Bunker Hill S. M. Co., 114 Fed., 417, as authority for their position; but it is not so. In their brief on the petition of the certiorari in this case, at page 60, counsel say:

"So far as these extra-lateral rights is concerned, this case is on all fours with that of Empire State-Idaho M. & D. Co. vs. Bunker Hill S. M. & T. Co., 114 Federal Reporter, page 417. It will be seen by reference to the diagram in that case, at page 418, that the San Carlos, which was the junior location, was so laid upon the apex of the vein as to cover a very substantial portion of the width thereof. Indeed, at the westerly end of the San Carlos location it covered practically the entire width of the apex. The Viola, the senior location, covered the balance of the width of the apex. As to the surface of the San Carlos, including that portion of the surface which was laid upon the lode, it had the title and exclusive right of possession, upon which surface the owners of the surface of the Viola might not enter. Both the Viola and San Carlos were so laid upon the apex that a portion of the width thereof traversed each claim from end to end. And it was held that the Viola, being the senior location of the two, was entitled to the entire vein as it went to the deep, between planes drawn through the end lines thereof extended in their own direction. It was also held that the San Carlos had extra-lateral rights upon the vein between planes drawn through its end lines; but that the extra-lateral rights of the Viola were prior to those of the San Carlos, and that such rights of the Viola must be fully satisfied, and that they could not be to any extent interfered with by the owners of the San Carlos."

Those who understand the facts of the case thus referred to will, on reading the foregoing, justify the criticism that it is a very good illustration of the manner in which a plausible argument may be constructed, by stating but a half truth, and by omitting such of the facts as do not support the foregone conclusion. The facts of that case were that the Viola was the older title by *patent* as well as by location. The Viola was located February 20, 1886. It was patented April 13, 1895. The San Carlos was located April 24, 1886, and was patented April 22, 1895. (See 114 Fed., 418.) There was and had been no conflict between the claims at the surface.

The south side line of the Viola, and the north side line of the San Carlos, was common to both claims, or, in other words, was identical; and this line bisected the lode lengthwise throughout the entire length of both claims. Both claims were owned by defendant in the court below, the Empire State-Idaho Mining & Development Company, and the court had not before it for decision the question of the relative extra-lateral rights of the Viola and San Carlos claims, but the extra-lateral rights of these claims, as against a mining lode claim of the plaintiff, called the "King," and it was decided that the San Carlos had the extra-lateral right as against the "King" claim. It was remarked incidentally in the opinion of the court, that the Viola, being the older of the two locations, would be entitled to pursue the lode extra-laterally as against the San Carlos, but that question was not involved, because, as before said, both claims belonged to the defendant in the action. But the dictum of the Ninth Circuit Court of Appeals in that case, instead of being as the respondent's counsel propose, an authority or argument against petitioners, is in their favor, because if an older patented or located claim on a broad lode has the extra-lateral right as against a *non-conflicting* claim on the same lode, for a much stronger reason, has the owner of a senior patented claim on a broad lode, the extra-lateral right against the owner of a *conflicting* claim, who has failed to assert his adverse claim in the mode required by the statute. It can not, therefore, be fairly or reasonably asserted that the two cases can be classified as "on all fours" in likeness. If there be a case which is "on all fours," as the phrase is, it is the "Stemwinder case," wherein the finding of the court was as follows, at page 539:

"That the Last Chance lode mining claim, as shown on said diagram A above (the diagram already set out), was located by its original claimants subsequent to the location of the 'Stemwinder,' and although the worded notices of each dated on the same day of September, 1885, the Stemwinder discovery and location was made *prior* to the said Last Chance and its rights attached first to the ground now in dispute between the parties; and I find that upon an application for patent to the Last Chance lode mining claim, as described in said diagram, no adverse claim was made by the said Stemwinder owners to the ground in conflict as shown on said diagram, and that the said Last Chance Mining

Company received their patent therefor as so described and is entitled to all the rights conferred by such patent." (109 Fed., 539.)

The conclusion of law was, that the Last Chance, being the prior location, was entitled to pursue the lode extra-laterally, which was affirmed by the Circuit Court of Appeals. (109 Fed., 538.)

And as before said, it was re-affirmed by the court, after a rehearing and reargument. (114 Fed., 420.)

These determinations necessarily conclude the respondent's case and argument. For what is the assertion by respondent of priority of location of the Jordan and Gem claims over the Kempton and Ashland claims, but the assertion of a conflict claim, which this court has declared can not exist after the time to protest or file an adverse claim has gone by? What is this denial of extra-lateral rights in the premises, to the owners of the Kempton and Ashland claims, and the asertion of those rights to be in respondent, in virtue of the alleged prior locations of the Jordan and Gem claims, but the assertion of a conflict and adverse claim? That these are adverse and conflict claims is as obvious without argument as with it.

Instead of making such adverse claims before the issuance of the patents, as required by the statute, the respondent insists on asserting and litigating them more than twenty-five years after the patents have been issued, during which time the premises have been in the peaceable possession, and immediate occupation, of the patentees and their successors in title.

6. DECISIONS OF SUBORDINATE COURTS OF THE COUNTRY IN HARMONY WITH DOCTRINE OF THIS COURT, IN LAVAGNINO VS. UHLIG, CONCERNING CONCLUSIVENESS OF PROCEEDINGS IN LAND DEPARTMENT, WHEREBY PATENT TO MINING LODE CLAIM IS ISSUED; AND IN ACCORD WITH UNDERSTANDING AND INTERESTS OF THOSE ENGAGED IN MINING INDUSTRY.

The foregoing declarations by this court, as well as of the subordinate courts of the country, respecting the conclusiveness

of mining patents, are in accord with the understanding of the mining community, and are in entire keeping with the best interests of those engaged in mining, especially throughout the western part of the United States. If it were not so, and if it were desirable or beneficial to have the law otherwise than it has been thus interpreted and applied, it is certain that congress would have been requested to change the statute in such wise as would give a different effect to the proceedings for obtaining a patent. But it is not desirable, nor would it be of benefit to the miner, that a patent, or the proceedings for obtaining one, should have a different legal effect. The act of May 10th, 1872, was designed to promote the mining industry of the country, in the production of gold, silver, lead, copper and other metals and minerals. To do that it was a matter of prime importance that there should be stability in the titles of those who might engage in the hazardous business of expending their money in lode mining. The evil to be remedied—that which induced the legislation—was the imperfect character of titles—the uncertain tenure—the distressing and increasing and blackmailing litigation, where so much rested in parol, and no one could be secure in the fruits of his risk, labor and outlay. These, among other considerations of good policy, made it necessary to found a new and distinct system for the disposal of mining lode claims, the prominent and essential feature of which is a notice *in rem* and a competent *judicial* agency, to determine the rights of those so notified.

7. PROCEEDINGS IN LAND DEPARTMENT FOR PATENT—EFFECT OF.

The notice required of application for patent is certainly sufficient process to be the foundation for a conclusive adjudication.

"Again, it is, as stated, conceded that no adverse claim was filed by the complainants, and I think it follows therefrom that judgment has gone against them as to all claims which they may have had or supposed they had. The language of the statute is somewhat peculiar, and its peculiarities were commented upon by Judge Hallett in the opinion filed. It reads:

"'If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of

the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5 per acre and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.' (Section 2325, Rev. St.)

"'It shall be assumed that no adverse claim exists.' By whom assumed, for what purpose, and to what extent? By the government, the owner of the land, the party offering it for sale; in order that the claims of all other parties to the land and the benefit of the owner's offer be presented and determined, and that thereafter the government may deal with the applicant alone, inquiring simply whether he has performed the prescribed conditions; and conclusively assumed. The proceedings before the land department are judicial, or quasi judicial, at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases, and many other present familiar illustrations. The sufficiency of the notice in these cases is unquestioned even though the adverse claimant be not named, and no personal service be had. And if the parties be brought in obviously it is that their claims be presented and determined. The succeeding section provides how such claims if presented shall be determined. Even without such section the purpose would be apparent. It would be grievous wrong to leave disputed claims unsettled and when the owner of lands making such general offer prescribes time, place, tribunal, and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts.

"Conclusively assumed, any other rule would destroy the practical value of the provision. If, notwithstanding his failure to adverse, a party may still present and litigate his rights, of what use to adverse? A failure to do so might give his adversary the advantage of a prima facie title, but the real question, the absolute rights, would remain undetermined. The applicant would hesitate to improve and develop his property, because ignorant of what contests were before him, what claims might be pre-

sented. And the contestant might wait till the evidence in favor of the applicant's right had ceased to exist or passed beyond his control, and then unexpectedly come forward with his claims.

"Publication of notice is process, bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land."

Wight vs. Dubois, 21 Fed., 693-696.

Therefore, when the patent is issued, every party who may once have had an adverse or conflicting claim is concluded thereby. Mining Co. vs. Tunnel Co., 196 U. S., 337-355.

When the patent issues, or the time to file an adverse claim has expired, there arises an *indisputable presumption* that no conflict claims exist. Lavagnino vs. Uhlig, 198 U. S., 443-455.

The foregoing considerations seem to warrant us in saying that the proceedings whereby the Jordan and Gem claims were patented, as well as the proceedings which resulted in the issuance of the Kempton and Ashland patents, determined that the owners of the Jordan and Gem claims had no conflict claims which they could assert against the Kempton and Ashland titles as patented; whether such claims be priority of location or extra-lateral rights, depending upon priority of location. The Circuit Court of Appeals holds that there is some burden on the petitioners in this cause to go behind the patents, and to allege and prove that the question of priority of location of these conflicting claims was in some way brought directly in issue in the patent proceedings, and was in such proceedings directly decided in favor of the owners of the Kempton and Ashland claims, the same as if there had been a suit at law and a judgment in personam, or that otherwise, neither the Kempton or Ashland patents, nor the exceptions in the Jordan and Gem patents, are effectual to debar the respondent from asserting the adverse claims of priority of location and extra-lateral rights against the Kempton and Ashland patents.

This can not be true, for the reason that in every case where no adverse claim is asserted as required by the statute, the legal effect of the proceedings in the land department, which result in the issuance by that authority of a patent, is the same as a judgment *in rem*. It fixes the status of the *thing* granted in respect

of all conflicting rights whatsoever. Whether the patent is issued under section 2325 of the Revised Statutes, *without adverse claim filed*, or under section 2326, *after* adverse claim has been filed, and the matter adjudicated in court, the effect after adjudication is the same. Jefferson M. Co. vs. Anchoria, etc., M. Co., 32 Colo., 176-182.

The Last Chance-Tyler case is an authority in an adverse suit that there may be determined, in determining the ownership of a conflicting area, the priority of location of the two claims in conflict, and that, although the adverse suit only involved this limited area, in which there was no apex of a vein, that afterwards, when a conflict arose under ground, through the assertion of extra-lateral rights, this determination settled the fact that the claim which was adjudged prior as to the tract in controversy was prior for extra-lateral purposes as to the areas that were not in conflict, so that the determination was not merely of the respective rights to the surface conflict, but a determination as well of the respective ages or priorities of the two claims throughout their entire extent. This naturally resulted, because each claim is an entirety, and the presumption is, nothing else being shown or made to appear in the proceeding, that the title of each claimant is equally good as to portions of it, and that the title to each portion depends upon a location which is of the same age as to all parts of the claim. If, in an adverse suit, the relative priorities of the entire claims may be determined, though but small portions thereof are in conflict, the same thing may be done necessarily in the land department, where no adverse is filed. Each applicant for patent goes before the interior department with the assertion that he is entitled to the possession of the premises as a lode mining claim, located upon the unoccupied and unappropriated mineral domain; that he is the prior valid locator of all the territory embraced within his claim. He stands with reference to his claim as though he had filed a complaint in court naming those who have conflicting claims as defendants, and had expressly stated therein that his claim was prior in location to their claims, and therefore he was entitled to the conflicting portions; and since the proceeding in the land office constituted process, the bringing of conflicting claimants into court and giving them their day, their opportunity

to be heard and to resist these assertions, those who fail to come stand exactly in the same attitude as the defendant, in the suit supposed, who defaults and upon that default has judgment sustaining the complaint entered against him. The effect of the proceeding in the land office, without adverse, is that the assertion of prior location to the ground in controversy is maintained, and judgment is entered by default against all those who have conflicting claims. The patent which issues as a result of these litigations needs only to be supplemented to the extent of showing that the conflicts existed, in order that the effect of the adjudication of priority shall be enjoyed. Where the patent does not disclose the conflict, it may be necessary to resort to the judgment files, to show that a conflict existed, so as to give full effect to the patent; but where the patent itself expressly points out the existing conflict, as the regulations of the department in such cases provide, and designates the points of crossing conflicting lines, the patent in itself contains all the elements necessary to enable the patentee to invoke the doctrine of the priority of his claim over all conflicting claims. The fact that he has a patent for the ground in conflict, that the conflict existed, and that he was required, in the nature of things, to make the allegations of valid location above indicated, presents a case in which the patent exhibits, without anything further, all the elements which were present in the Last Chance-Tyler case, as a result of an investigation of the pleadings and proceedings in that suit. It should be remembered that there is this difference between the attitude of the adverse claimant in that case and the patentee in the cases here under consideration. There the applicant for the patent had made his allegation in the land office that he had the prior location covering the ground in controversy. Thereupon his contestant filed his adverse, denying this fact, asserting, on the contrary, that he was entitled to a portion of the ground as a result of the fact that he had a prior location covering the same, and thereupon he brought his suit in court to maintain this assertion, and obtained a judgment, upon which judgment he was entitled to take a patent, by a special provision of the statute. It was necessary for him, therefore, to exhibit the fact, since he had not made an application, and had taken the other steps which con-

stituted his assertion of priority, that he had proceeded by an adverse suit to make this corresponding assertion. With this difference—and it is one provided for in the statute—pointed out, the effect of the two proceedings become identical. He simply did in court what in this case the patentees did in the land office. He did it there because of the requirements that he should thus proceed. The others did the same thing in the land office because they were there required to proceed. His antagonist fled from the fight, and he obtained a default judgment, which sustained his assertion that he was entitled to the ground in conflict, because he owned a prior location covering it. The applicant for patent, asserting ownership, and the conflict appearing, stood in the same attitude against his antagonist, who also declined the controversy, with the result that there followed necessarily, by the provisions of the statutes, an equally conclusive adjudication that the necessary and assumed allegation made in the application for patent, of priority of location, had been established. Thereafter the two holders of patent stand in the same positions of relative age against those who decline to controvert their assertions of priority, respectively, in the courts and in the department. Each has an adjudication that as to the conflict his claim is prior. It follows, as this court has held, that the result of this allegation, though made in a case where but a portion of the claim was involved, covers the full extent of both claims, and we urge that upon the same reasoning and same principle the like effect must be given to the similar allegation in the land office.

8. OPINION OF CIRCUIT COURT OF APPEALS, CONCERNING NATURE AND EFFECT OF PATENT PROCEEDINGS IN LAND DEPARTMENT, WHEREBY PATENT TO MINING LODE CLAIM IS ISSUED, CONSIDERED.

The opinion is entertained and enforced in the Circuit Court of Appeals, that an alleged priority of location of the Jordan and Gem claims over the Kempton and Ashland, shown only by the location notices we have discussed under the subject of relation, necessitates the awarding to the former claims the extra-lateral right to the segment of the alleged broad lode in controversy, not-

withstanding the seniority of the Kempton and Ashland patents and entries; that petitioners in making out their defense, and showing their title to the part of the lode in dispute, are required to plead and prove that the question of priority of location, and of the right to pursue the part of the lode apexing in the conflict area on its dip, or other right, except the right to the possession of the surface ground, was put in issue, and specifically, directly and actually determined in favor of the owner of the Kempton and Ashland claims in the patent proceedings which resulted in the issuance of the patents thereto; that otherwise the respondent is at liberty to assert in this suit priority of location of the Jordan and Gem claims, over the Kempton and Ashland, and the extra-lateral right to the lode, apexing as aforesaid. In other words, that an adverse claimant who had failed to file his adverse claim, in the mode required by the statute, may thus bring forward, at any time after the issuance of the patent, and have litigated any adverse claims which he may assert, whether it be priority of location, extra-lateral right, or other adverse claim, save the right to the possession of the surface, unless it shall affirmatively and expressly appear that such adverse claim was actually put in issue, and determined as aforesaid, in the patent proceedings. These notions are very manifest in the opinion, from the following exposition of it:

"If the present suit related to the superior right to these surface areas, *or to any underground or extra-lateral rights necessarily following or incident to such surface ownership, the claim of estoppel would be well taken*, but as the controversy is over a different subject-matter, and it is not shown that the question of priority of location was in fact presented and determined in the course of the patent proceedings, the estoppel can not be sustained. * * * An application for a patent to one of the conflicting claims presents the question: Which is the superior claim within the overlapping surface boundaries? And the inclusion of the area in conflict within a patent to one of the claims is necessarily a determination that, at the time of the patent proceedings, such area is a part of that claim. Applying these principles to the facts of the present case, it is seen that the issuance of a patent for the defendant's claim including therein the areas within the overlapping boundaries, operated as a declaration or determination that within these surface limits, the defendants' claim was super-

ior, but not necessarily that it was prior in location. * * * Treating the patent proceedings as involving or as equivalent to, a controversy between these parties or their predecessors in interest and title, the subject-matter of that controversy was the surface conflict between their respective claims, while the present controversy is over extra-lateral underground rights, not necessarily following the surface conflict, which is essentially a different subject-matter, and could not have been made the subject of an issue, trial or decision in the course of the patent proceedings." (See opinion, C. C. A., in printed petition for Certiorari, pages 26, 27, 134 Fed., 769-775-776.)

It is supposed that there is warrant for these conceptions, in the decision of this court in the case of Last Chance Mining Co. vs. Tyler Mining Company, 157 U. S., 583; 134 Fed., 767, 776, 777.

The inferences which this opinion seems to derive from the decision of this court in Last Chance vs. Tyler, are, that if, in a suit brought and tried upon an adverse claim, the plaintiff should in his complaint state but one cause of action and adverse claim, and that should be determined against him, and that thereupon, a patent for the lode should be issued to the defendant, that still, in a later suit, the plaintiff may assert *some other adverse claim* against the defendant's patented rights, and have it litigated in such subsequent suit. That unless the defendant shall show that the specific claim was presented and determined in the former suit, or in the course of the patent proceedings, that question is open to further litigation. In other words, suppose that in the adverse suit, the plaintiff has pleaded that his title and right to possession of the lode is a peaceable, quiet, open, notorious, exclusive adverse possession, for the period of the statute of limitations. Suppose that such pleading has been overruled, and that judgment has gone against him, and that the patent has been issued to the defendant. Under the reasoning and conclusion of this opinion, the plaintiff may in any future suit against the same party, prove priority of location of the lode, against the title, which the defendant holds under his senior patent, and this conclusion is supposed to have support in a decision and opinion of this court, wherein this court said that "other questions may be litigated in an adverse suit besides priority of location." We assert (with

proper deference, however), that the decision of this court in Last Chance vs. Tyler does not justify the conclusion thus derived. For this court then dealt with a special, not the general subject-matter of an adverse suit, being the special matter then under investigation. What is the *subject-matter* of an adverse suit? Obviously, *all the adverse claims* to the claim, or any part of it, for which a patent is requested. Not one basis of adverse claim merely, but *all* the adverse claims which the plaintiff or adverse claimant may have or assert. And all for the purpose of settling the priority of valid location, the resulting superiority of right. What is the purpose of the adverse claim or suit? Obviously, the settlement and determination of *all*, not one alone, of the adverse claims which the adverse claimant may have or assert, and that, before the patent is issued. If he omit any, he will be barred as to that one as completely as if he had made no adverse claim at all, or had made it and been defeated upon it. We think that since the decision of this court in Lavagnino vs. Uhlig, we are justified in asserting this with much confidence. For there it is said in substance, that when no adverse claim is filed, and a patent issues, there arises an indisputable presumption that no conflict claims exist. Therefore, when we consider the subject-matter, the purpose and object of the patent proceedings, in the light of the statute, whether in cases of adverse claims filed, or not filed, the rule of res adjudicata which the Circuit Court of Appeals has applied in this case, has no proper application, nor fit operation. If such a rule shall ever be finally established, then no adverse claimant need ever file any adverse claim at all, since if he do not, and the lode claim goes to patent, he can at any time thereafter assert his adverse claim, in an action to quiet title, for the reason that the patent can never in such case show that the question of priority of location "was in fact presented and actually determined in the course of the patent proceedings," because the plaintiff has lain by and refused to put that matter in issue, in the patent proceedings in the mode required by the statute. By such means, the intention and purpose of this statute would be easily defeated and overthrown. The chief subject of determination in adverse proceedings or application for patent is the ownership of the lodes apexing therein and of the extra-lateral rights which are

of the very essence of that ownership. This is the very subject-matter of such determination.

This court did say, in its opinion in Last Chance vs. Tyler, that questions other than priority of location "may be litigated in an adverse suit." But your honors did not there say, nor have you ever said, that the litigation could be determined without determining the relative priority of the contesting locations; that the extra-lateral, or other right of a patentee of a lode claim patent may be attacked by an adverse claimant who has failed to present his adverse claim in time, and in the mode required by the statute. Contrariwise, this court has hitherto declared, as well as have many subordinate courts of the country, that a patent can be assailed only for fraud, accident or mistake in issuing it, or on some other ground of equity jurisprudence; or when it appears on its face, that the land department had not jurisdiction to issue it. The reasoning which assumes to perceive such likenesses between the case of Last Chance vs. Tyler, and this one, and to assign them to the same class, is erroneous.

Moreover, the reasoning of the opinion of the Circuit Court of Appeals we submit is unsound, because it gives a conclusive legal effect to facts assumed to have been proved by the evidence adduced by respondent, and at the same time, refused to give any effect to those facts which are proved, and by which such legal effect is met and overcome. For it first determines that the fact of priority of location of the Jordan and Gem claims is proved by the notices of location, but declines to consider the legal effect of the exceptions in the Jordan and Gem patents, which form also parts of those exhibits, and then in its concluding paragraph, holds that this court has "*recognized that superiority of right is not always controlled by priority of location*," and then, "that the claim of estoppel *was interposed* by the defendants, and the burden was upon them to sustain it." In other words, that these petitioners must plead and prove matters of fact, which have been proved by the respondent as substantive parts of its own case.

The only estoppel which the defendant claimed was, that their patents, and the exceptions in the Jordan and Gem patents, should be given the proper legal effect. They assert none other.

When, in addition to this reasoning, there is perceived on the face of this opinion, the obvious fact, that it overlooks and ignores the truth, that there is a conflict area in Ashland as well as in Kempton ground, and that the Ashland conflict area in U. S. Lot 67 and U. S. Lot 69, cuts laterally, or entirely across the supposed broad lode, and thus proves that it is bisected laterally as well as longitudinally, by the conflict area, embraced in the Kempton, and the two Ashland claims, all the general conclusions of the opinion are found to be without support in fact. We point out the details of this situation under another caption. The case on the last consideration noted, is not different because lot 69 is not pleaded, as part of the petitioners' ground and defensive title, for "In an ordinary action to quiet title, not involving a contest in the United States land office, the plaintiff must recover, if at all, upon the strength of his own title, it becomes immaterial to inquire into the rights of the defendant, as to whether he had failed to prove title in himself, to the ground in controversy."

Schroder vs. Mining Company, 144 Cal., 628. The statute of California relating to quieting title, section 738 of its code of civil procedure, is in the exact language of section 3511 of the revised statutes of Utah, 1898, which counsel for respondent assert is, and which the Circuit Court of Appeals decides is, in all respects controlling in this cause. According to the doctrine of the case last cited, petitioners will make a sufficient defense to this action, if they shall prove that they are working and mining in a lode which has its apex outside of, and which dips under Jordan Extension, Northern Light, Grizzly and Fairview claims, and which apexes in ground which does not belong to the respondent.

The opinion of the Circuit Court of Appeals further announces the following proposition bearing upon this branch of the case, page 775:

"The defendants have the older patent, and we will assume that originally there were surface conflicts, as is insisted, and that the areas in conflict were patented as parts of the claim of defendants.

"If the present suit related to the superior right to these surface areas, or to any underground or extra-lateral right necessarily following, or incident to such surface ownership, the claim of estoppel would be well taken, but as the controversy is over a different subject-matter, and it is not shown that the question of priority of location was in fact presented and determined in the course of the patent proceedings, the estoppel can not be sustained."

Page 25, petition for *Certiorari*, 134 Fed., 769-775.

It is not necessary to *assume* that "originally there were surface conflicts" among these several claims, for the reason, that the several patent surveys and plats, and the descriptions in the patents, and in the pleadings in this case, determine, and prove that there were conflicts, and their exact form and extent. The tracings upon the ground of the lines of the claim also show their existence. We are not permitted to go behind the patents or the pleadings, to show that there was none, nor that any of them was different from that expressed in the patents or the pleadings.

Waterloo Co. vs. Doe, 56 Fed., 685.

The underground and extra-lateral right to pursue the lode which was covered by the conflict, on its dip beyond vertical planes of the Kempton and Ashland side lines, is the very subject to which this suit relates, and it is that which is affirmatively pleaded in the amended answer, as the sole right to which this controversy relates. That right is given by the statute, and the terms of the patent, to the patentee. It is not asserted by petitioners, however, that the right to pursue the lode on its dip is a right which is *incident* to ownership of a *lode* which has its apex within the exterior surface boundaries of those claims. It is a substantial subject of the grant. No extra-lateral right can be recognized as incident to surface ownership only. A lode is not in contemplation of law an incident of the surface ground of a mining lode claim, but contrariwise, the surface ground is an incident to the lode. The opinion concedes that the controversy does not relate to the surface ground, for if it does, the opinion affirms, "the claim of estoppel would be well taken." The patent

is not merely for the surface, but is specifically for the lode, including and naming the extra-lateral rights.

The opinion concedes, also, that if the controversy "related to any underground or extra-lateral rights, *necessarily following or incident to such surface ownership*, the claim of estoppel would be well taken," it then declares, that the controversy relates to neither of these, but to a "different subject-matter," which is said to be, a "controversy over extra-lateral underground rights, *not* necessarily following the surface conflict, which is essentially a different subject-matter, and could not have been made the subject of an issue, trial, or decision in the course of the patent proceedings."

Page 27, petition for *certiorari*, 134 Fed., 769.

These elucidations of the grounds of this decision, make it easy to perceive, that the reasoning of the opinion, has the incurable defect of supposing, that in the patent proceedings whereby the Kempton and Ashland patents were issued, the subject-matter which was, or might have been, "the subject of an issue, trial and decision" was the title and ownership of the *surface ground only;* eliminating and excluding the lodes apexing therein and the extra-lateral rights which are an inherent attribute of said lodes; and also in assuming, that in any case, there can, or may be, in any patent proceeding whatsoever, a "controversy over underground and extra-lateral rights necessarily following, or incident to surface ownership." The ownership of the lode including its extra-lateral rights is determined by the adverse proceedings and is necessarily a matter involved in the determinations had in those proceedings.

Moreover, the foregoing indicates that the Circuit Court of Appeals has adopted the suggestions and arguments of counsel for respondent, concerning the object, scope and effect of the filing, or the failure to file an adverse claim in patent proceedings for a mining claim. For in their brief in that court, as well as in their brief or argument in this court on the application for *certiorari*, occurs the following:

"When one applies for a patent to mining ground and another claims that the ground, as surveyed for patent, conflicts in

part with a location owned by him and files his adverse claim, and brings his suit to determine the right of possession, as between him and the applicant, pursuant to the act of 1872, the title and right of possession to the *surface conflict is alone involved.*"

Respondent's Brief on Application for *Certiorari*, page 44.

Conceptions, or propositions in the mining law, more destitute of legal sanctions, can scarcely be imagined. In every application for a patent for a mining lode claim, the lode and the surface ground covering or embracing its apex and the right to follow the vein upon its dip stand to each other in the relation of principal and incident. The lode, with its apex rights, is the principal and essential thing applied for. the ground covering or embracing it, is merely its incident. Without a discovered lode, the statute gives no authority to apply for, or to issue a patent for a mining lode claim; and for the simple reason that without a lode there is no mining lode claim at all; therefore, title to the lode itself, as well as to its inherent extra-lateral right to pursue it on its dip, within the end line bounding planes of the claim, and also, the incident right to certain ground covering and embracing the lode, must of legal as well as logical necessity have been the subject-matters of inquiry and determination, "in the course of the patent proceedings," which resulted in the issuance of the Kempton and Ashland patents. The patents themselves conclusively prove that the lode and such incident rights were the subject-matters considered in the patent proceedings, for those are the very things conveyed by the very words of the patents. In an early case in Colorado, the Supreme Court of that state said:

"The surface ground, and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing and the surface ground is incident thereto. In conveying a segment of the earth located under the provisions of the act, it is the intention

of congress to convey a mine contained within that segment, as the *substance of the grant.*"

Wolfley vs. Lebanon M. Co., 4 Colo., 112-116.

13 Morrison M. R., 282; Morrison's Mining Rights (12th Ed.), 144.

U. S. Rev. Sts., section 2322.

Respondent relies upon language in the opinion in Montana Company vs. St. Louis Company in 102 Fed., 430, 432, as authority for the assertion, that in adverse proceedings under the statute, title to the surface ground conflict is alone the subject of adjudication. No such conclusion can be fairly deduced from that decision. The controversy in that case was not upon an adverse claim under the statute, but was a dispute about the construction of a deed which had been given and accepted to settle a conflict in area between the St. Louis claim and the Nine Hour claim.

The owners of the Nine Hour claimed that the terms of the deed conveyed to them a right, not only to the surface ground, but expressly to the ores beneath the surface of the 30-foot strip conveyed by the deed, although the apex of the ore was in territory owned by the St. Louis claimant. The court denied such right, upon the theory that it was not the intention of the parties to the deed, that it should convey any rights to a lode, or to the ores beneath the surface of the ground conveyed, or to the right to lateral pursuit of a lode apexing in the St. Louis claim. The court, at page 432, says:

"If the adverse action which was brought by the owners of the Nine Hour claim, had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights as to the ores beneath the surface or otherwise than as they are controlled by the mining laws of the United States."

The owners of the St. Louis claim would still have retained the right to follow their vein extra-laterally in its dip beneath the

surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action, than could they have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? That case, upon a new presentation, is now pending in the United States Circuit Court of Appeals of the Ninth Circuit, and its further discussion here now is not pertinent, but it decided nothing supporting opposing counsel's contention.

There was no lode apexing in the 30-foot strip. There was no assertion that the suit related to the ownership of a lode; the defendants relied upon a deed, not upon a patent, therefore, it is obvious without argument that a suit which does not relate to the patenting of a lode, has no relation to, and can not be classified with, a proceeding for obtaining a patent to a mining lode claim, under the provisions of title 32, chapter 6 of the Revised Statutes.

The proposition that the patent proceedings in the land department determine the surface conflict only, can not be maintained.

The great authority and dignity of the court, whose decision is here under review, and our high regard for its decisions, must be justification for this extended discussion of what we are convinced is a serious error, most hurtful to the petitioners.

There is an attempt to evade the legal effect of the patents by the suggestion that there is no evidence of any surface conflict between the Kempton and Mountain Gem claims, as they were originally located. This is put forth by counsel for the respondent, on page 45 of their brief, on the application for certiorari, where it is said:

"Now, as we have already pointed out, there is substantially no conflict between the Kempton lot 55 and the Jordan lot 64, until we reach the easterly end line of the Mountain Gem, and defendants have made no attempt to show that there was any surface conflict between the Gem and Kempton as severally located. Both the Jordan and the Gem were located prior to any legislation by congress on the subject of locating mineral lands—

when the subject was governed wholly by the local laws and regulations of the district." Brief, page 45.

To this, the all-sufficient answer is, that the patents themselves are conclusive evidence of what the conflict was between the Kempton and Mountain Gem as severally located. As before said, we are not permitted to show that the fact is otherwise than is there expressed. The argument of respondent admits that the evidence shows a surface conflict between the Kempton and Jordan claims, as *they* were originally located. How was this proved? It was proved by the same method and kind of evidence as was the conflict between the Kempton and Mountain Gem, namely, by the introduction in evidence of the patents, with their plats and surveys. It was proved by the best evidence, and other evidence to contradict it, would have been inadmissible.

"It may be announced as a general rule, that a patent is conclusive evidence as to the limits of a location, and it can not be assailed by showing that its actual boundaries were different from those described in the patent."

Lindley on Mines, 2nd Ed., page 1389, section 778, volume 2.

Waterloo Co. vs. Doe, 56 Fed., 685.

The conclusiveness of the Kempton and Ashland patents of February 23rd, and September 27th, 1875, against these conflict claims, which are now asserted by the owner of the Jordan and Mountain Gem claims, is further confirmed by the exceptions in the Jordan and Gem patents before set forth. These exceptions are of the part of the lode within the conflict area, and of the extra-lateral rights incident thereto. They are *good exceptions* because thereby, it is certainly made known what is conveyed by the patents, and what not. Each of them fulfills all the conditions and rules by which a *good exception* is verified and proved, because:

(a) It is in *apt words*. (b) The thing excepted is a *part of the thing previously granted*. (c) It is of a *part only* of the things previously granted; and not of any other thing. (d) It is of a thing which is *separable from* the thing granted; and not

an inseparable interest or incident. (e) It is such a thing as that *the party who accepts may retain it.* (f) It is of a particular thing out of a general one; not a particular thing out a particular one. (h) The thing excepted is certainly described and set down.

4 Cruise Dig., 271.

The Mountain Gem exception excepts not only the surface ground embraced in the conflict area, but also the "Mountain Gem vein or lode therein, throughout its entire depth, the top or apex of which lies inside such excluded ground." To except the lode thus apexing "throughout its entire depth" is to except it extra-laterally, if in its descent into the earth, it departs from a perpendicular, as well as if it descends vertically. The grant in the Jordan patent, is of that part of the "fifty-two hundred (5,200) linear feet of the said Jordan Silver Mining Company's mine, together with the surface ground hereinbefore described, which is not embraced by said surveys 39, 53, 55, 67 and 69, as represented by yellow shading in the following plat." The word *mine* in this exception, is used in the sense of lode or deposit of metalliferous ores, earth and rock, in place, and other material suitable or profitable, to be mined and appropriated for its metals of gold, silver, lead, copper, and other metals, and not in the sense of *an excavation* in the crust of the earth, for the digging out of metalliferous ores or other useful mineral product. Thus considered the exception has reference to a lode, and extends to the lode in its descent into the earth, on its dip extra-laterally, as well as its descent into the earth vertically. As before shown, the exception covers the entire width of the apex in Jordan ground, because the entire width of the Jordan claim is covered by the Kempton and Ashland claims throughout 550 feet in length of the conflict area. By the decision of the Circuit Court of Appeals these exceptions are wholly overlooked and ignored. Why did the government write these exceptions into the Jordan and Gem patents? Obviously, for the simple reason that it had previously granted the excepted part to the owners of the Kempton and Ashland claims.

10. PARTY RELYING ON DEED CONTAINING EXCEPTION MUST PLEAD HIMSELF WITHOUT THE EXCEPTION.

An exception in a deed, though not a technical estoppel, is so in effect. The legal effect of the exception is as though the thing excepted had never been included in the general description in the deed. Therefore, whoever relies on a deed containing an exception must plead and prove that he is not within the exception, otherwise he will be bound thereby. For this we have the direct and explicit authority of this court, as follows, page 604:

"An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which but for the exception, would have passed to the grantee under the general description. The effect in such cases, in respect to the thing excepted, is as though it had never been included in the deed. If, for example, a person should convey to another a block of land, excepting therefrom a certain lot previously conveyed, to sustain ejectment for any particular lot, it would be necessary for the pleading to show, that it was not the lot which had been previously conveyed. There is a general rule applicable, both to conveyances and statutes that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must state in pleading the general clause, together with the exception, and must also show by testimony that he is not within the exception."

Maxwell Land Grant Co. vs. Dawson, 151 U. S., 586-604.

Here, there is no such pleading, and no such testimony. Therefore, these exceptions must have their true legal and practical effect.

In Argentine Co. vs. Terrible Co., the plaintiff in the court below sued to recover certain mining ground known as the Adelaide lode. The defendant, the Argentine Company, had two patented lode claims called the Pine and Camp Bird claims. The Adelaide was the oldest location and in the patents of the Pine and Camp Bird claims there were exceptions in favor of the Adelaide claim, and thereupon this court gave effect to such exceptions in these words:

"The defendant relied on the trial upon patents of the United States issued for its several claims, but those patents contained an exception, which would seem to exclude its pretensions. It is as follows, after the habendum clause: 'Excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also, excepting and excluding all veins, lodes or deposits, the tops or apexes of which lie inside of the exterior lines of said Adelaide survey at the surface, extended down vertically, or which have been therein discovered or developed.'"

Argentine Co. vs. Terrible Co., 122 U. S., 478-486.

The exceptions in the Jordan and Gem patents, if given a like effect, must effectually "exclude the pretensions" of the respondent, there being no exception in the Kempton and Ashland patents, in favor of either the Jordan or Gem alleged senior locations. Such seniority of location, if it ever existed at all, must be deemed to have been waived, or relinquished.

Lindley on Mines, 2nd Ed., volume II, section 782.

Neither the argument of opposing counsel, nor the decision or opinions of the court which is here under review, has attempted to explain to us how, or on what principle, these exceptions in the Jordan and Gem patents are nullified or overthrown by the introduction in evidence of the alleged location notices of the Jordan and Mountain Gem claims.

II. THE CLAIM OF RESPONDENT IS AND THE CIRCUIT COURT OF APPEALS HELD THAT THE PRIOR LOCATOR HAS EXCLUSIVE RIGHT OF LATERAL PURSUIT ON A BROAD LODE, ALTHOUGH ONLY A PORTON OF THE WIDTH OF THE APEX IS WITHIN THE CLAIM.

Admitting there is a broad lode, and that whoever has the prior title, to a segment of the lode, has the right to pursue it laterally within the end line bounding planes of their respective claims, still the petitioners should succeed. If a lode whose apex is wider than the surface area of two conflicting claims, or lies partly in each of them, may be followed by the owner of the older location, or older patent, as the case may be, extra-laterally, then, for reasons we have stated, the petitioners should succeed.

The authorities which give the right to follow a vein having its apex in this situation are:

Mining Co. vs. Mining Co., 5 Utah, 3-49-54.

St. Louis M. Co. vs. Montana M. Co., 104 Fed., 664.

44 C. C. A., 120; Empire State Co. vs. Bunker Hill Co., 114 Fed., 417.

52 C. C. A., 219.

Rose vs. Richmond M. Co., 17 Nev., 25-55.

Last Chance Co. vs. Bunker Hill, 131 Fed., 579.

Empire St. vs. Bunker Hill, 131 Fed., 591.

There are decisions, however, which hold that where the apex of the lode is not entirely within a claim the lode may not be followed upon its dip, that neither of them has the lateral right of pursuit.

Hall vs. Equator.

12. MISUNDERSTANDINGS AND MISCONCEPTIONS OF THE FACTS BY THE CIRCUIT COURT OF APPEALS, AND INCORRECT PRESENTATIONS THEREOF IN THE MAPS INTRODUCED IN EVIDENCE AT THE TRIAL BY THE RESPONDENT.

We have referred, at various points in preceding portions of this brief, to the misconception by the Circuit Court of Appeals of important facts in this case, which erroneous misconceptions manifestly and avowedly were influential in inducing that court to reach the conclusions announced in its opinion. We have also called attention to erroneous statements and presentations of facts by the maps which were introduced in evidence at the trial by the respondent. When these matters have been referred to, and the statement made concerning their existence, we have stated that in another portion of the brief we would call attention thereto in more detail. We now execute this promise. We feel that these matters have been made so consequential in the progress of this case that it would be unjust to the Circuit Court of Appeals and to the petitioners not to specify

some of the many misrepresentations of the facts of this case, especially by the maps of the respondent, and which relate to the conflict of the claims, the position of the alleged broad outcrop with reference thereto, and the relative portions of the alleged broad lode in the claims of the respondent and the petitioners.

In the opinion of the Circuit Court of Appeals, 134 Fed., 769, at page 770, it is said that "the southerly side lines of the Kempton as patented are in part coincident with the northerly side lines of the Old Jordan and Mountain Gem as patented, and the greater part of the width of the apex of the limestone is south of the lines so dividing the patented ground, and is within the surface boundaries of the Old Jordan and Mountain Gem." The prominence given to this statement, the absolute character of it, and the use made by the court of it in reaching its conclusion, demonstrate its significance in the minds of that court. In fact, the court was entirely in error as to the position of these lines and as to the extent of broad lode or limestone outcrop within the properties of the contestants in this litigation. An examination of the patent survey plats of the Old Jordan and the Mountain Gem claims, an examination and running out of the courses and distances and the exceptions set forth in the patents for these claims, and an examination of the patents and patent plats of the Kempton and Ashland claims, demonstrate, beyond the possibility of refutation, that the foregoing statement is erroneous in every essential particular. These surveys so contained in the patents and the patent plats, absolutely prove that the north side line of the Old Jordan "as patented" is north of the north side line of the Kempton for a considerable distance along the length of the conflict area, and that it is nowhere coincident with the south side line of the Kempton, but that the south side line of the Old Jordan or Jordan claim is coincident with the south side line of the Kempton, and not the north side line, as is erroneously stated in the opinion. The effect of this error in the position of the claim is clearly shown by a map marked "X," set forth at the back of this brief. The red line near the bottom of the map indicates the erroneous position given to the Jordan south side line, while the plat itself correctly presents,

as the patents and patent plats do, the real position of the Jordan lines. The true result is that the entire width of the Jordan claim lies directly on top, so to speak, of the Kempton and Ashland claims, for a distance of at least 550 feet lengthwise throughout the conflict area, and that all of this conflict area is patented to the Ashland and the Kempton claims. (See copy of plat marked "B," showing the Jordan as patented, opposite page 27 of this brief, and the description of the Jordan claims in the patent therefor, set out in the evidence in this case as a part of respondent's Exhibit "U," Record, pages 551-557.) This result, about which there can be, as we have stated, no dispute, and which is the true showing upon the ground, and as fixed absolutely by the patents and their plats, make significant the omission of the patent plat from the copy of the Jordan patent set forth in the respondent's copy thereof at Record, page 555. This change from the erroneously assumed position of the Jordan, stated in the opinion of the Circuit Court of Appeals, to its real position, radically changes the position of the limestone outcrop with reference to the Kempton and Ashland claims, and this is shown, ~~and also~~ in the plat ~~marked "4,"~~ at page 27 of this brief, which plat is a true copy, as we have before explained, of petitioners' Exhibit 21, the original of which is before the court in its full dimensions, for examination. Instead of the Jordan containing the larger part of the lime outcrop, and but little of it being found in the Kempton and Ashland claims, the fact is that all of the lime outcrop which lies within the boundaries of the Jordan in the territory referred to by the court was in the conflict with the Ashland and the Kempton, and is patented to and is physically a part of the last mentioned claims. No doubt the Court of Appeals was influenced by the coloring placed upon Exhibit "T" of defendants, wherein the limestone is outlined as having a width and position with regard to the claims which would give some ground for the misconception formed by the court. As a matter of fact, as demonstrated by the workings and the testimony of the witnesses with reference to the actual position of the limestone, with reference to the real lines, as we have shown them to exist, of these several claims, this limstone is colored much narrower in places than it actually is, wider

in others, and has its real position shifted as great a distance in some places as two hundred feet, or what amounts to a virtual transportation of the entire limestone belt for that distance.

Upon Exhibit "T," at the easterly end, the southern limit of the limestone outcrop is indicated as being at what is marked "Discovery Shaft, Jordan Discovery, 890.8," and the northern limit is about 240 feet to the north thereof. It is then given a course to the westerly, with a northerly termination at the westerly portion thereof, as shown upon the map, about 16 feet north of a working in which occurs the point "8.96." At this point the limestone is indicated as being only 128 feet in width. At a portion of the limestone intermediate between the easterly and westerly points mentioned, and immediately north of what is marked "U. S. M. M. No. 1," the width is outlined upon the map as 460 feet. From about this point the course or strike of this outcrop is given as being substantially 30 degrees different from what it is at the easterly end, and as demonstrated by the No. 1 west drift, and as testified to by witnesses for the respondent. It will be noticed that the west drift, at its most westerly point, north of the north edge of the limestone apex as colored upon the map, indicated upon the map, is about 775 feet. There is a difference in elevation between the level and the surface where the limestone is indicated, of 303 feet, as shown by the difference between the elevation of the drift, 1,037, and the elevation of the limestone, 1,340. Taking the dip of the limestone in the level to be 30 degrees, as testified to by witnesses on both sides, and extending this limestone to the surface at an elevation of 1,340 feet, we find that it will reach the surface at a horizontal distance from the west drift of about 480 feet, or about 295 feet less than the most northerly portion of the lime outcrop is indicated to be by the coloring upon the map; or, if it could be taken as true that the southerly limit of the limestone is as indicated upon the map, then there has been a failure to put to the north of it the limestone, where it would be brought by this extension, to the extent of 295 feet. This would carry the limestone, as to its northerly edge, to the center of the Kempton claim, and cause it to pass through the Jordan north side line near the corner No. 2 of the Northern Light, as indicated upon Exhibit "T," and 80 feet west of the westerly end of the Kempton.

91

carrying it directly through the westerly end line. A like investigation at other points along the level will show that the limestone outcrop is indicated substantially the same distance further south than the limestone outcrop is shown to be in fact. It is to be remembered that there is no testimony on behalf of the respondent that definitely fixes the lines of the limestone as indicated by the coloring. Mr. Smith, who made the map, stated that he put the coloring on under the direction of Mr. Tyler and Mr. Holden (Record, pages 320-321); Mr. Tyler stated that he directed it to be put on from his examination of the ground. (Record, page 431.) Neither of them testified that at any particular point on the map where the edge of the limestone is indicated by the coloring the limestone is shown. The position of the limestone in the west drift, as we have stated, is testified to by Mr. Holden (Record, page 329), by Mr. Neill, who ran it (Record, page 510), and there is no dispute upon this question. That the apex would necessarily be where we have indicated, in view of the regularity of the dip of the limestone at the angle of 30 degrees indicated, is easily ascertained by an examination of the map and the simplest of engineering computations. In addition to this, however, there are physical demonstrations of the correctness of our contention, the inaccuracy of the map, and the misapprehension of the Court of Appeals as to the facts. In what is known as the Ashland lower tunnel, which starts in quartzite and extends into the limestone, there is a disclosure of quartzite, at point 702 (Petitioners' Exhibit 21), which is 124 feet from the portal, and which is just south of what is colored red, in a working off from said Ashland tunnel level on Exhibit "T," being the most northerly of the workings from said lower tunnel level, the contact is found between the lime and the quartzite, all south thereof being in quartzite, so that the three workings colored in red, as representing ore immediately west of the Ashland lower tunnel, are in fact in quartzite, and not, as indicated, in lime. This same Ashland lower tunnel, which is only traced upon Exhibit "T" a little south of the south side line of the Jordan claim, extends in fact, as shown upon petitioners' Exhibit 21, on through the Jordan claim, and to what is designated thereon as the "Turn-sheet level," and is in the limestone upon the Ashland fissure vein, disclosing the presence of lime-

stone to its intersection with the west drift on the "Turn-sheet" level. This is a distance of 480 feet. This limestone, carried to the surface from where it is disclosed in the northern termination of the Ashland No. 2 tunnel, would bring it to the surface at the northerly side line of the Kempton claim, and some 250 feet north of where it is indicated upon Exhibit "T." In addition to this, the limestone is disclosed at the surface by workings in the Kempton claim, and in the upper Ashland tunnel, in conformity with this projection thereof. This is shown upon petitioners' Exhibit 20, in the workings upon the Kempton claim noted as "Caved pit," "Old stopes," "Old tunnel excavation and cave," and "Stripping on apex." The drift from the upper Ashland tunnel, colored in blue upon Exhibit 20, called in the testimony "West Drift," is in limestone, as testified to by Mr. Tyler (Record, page 445), and this limestone has a dip of 30 degrees from the horizon, and is also in ore and is an upper portion of the Kempton bedded vein. There is an upraise from the west end of this West Drift, which is carried up to within 18 feet of the northerly side line of the Kempton, and within sixty feet of the projection of the westerly end line of the Kempton claim, thus demonstrating that the limestone, and also the Kempton bedded vein therein, passes through the westerly end line of the Kempton claim. The territory in which the limestone is placed, without being carried as far north as it should have been at its outcrop upon Exhibit "T," is in a gulch, and not so exposed as to be examined from the surface, except at the workings we have indicated and other workings showing its outcrop to be in line with those we have specifically designated.

Other illustrations can be taken from the testimony confirming, by workings, by the position of the limestone, by its dip, by its actual disclosure, that the coloring representing the outcrop of the limestone is erroneously located, and especially so as to the northerly extent thereof. No testimony was introduced showing any difference in the west end to which we have referred, nor that the dip of the lime was other than 30 degrees, or that the position of the limestone at the surface and underground was other than as we have indicated, while much of the testimony sustains our statement.

There is also a mislocation of the boundaries of the Mountain Gem claim. The patent survey plat thereof, marked "C" (opposite page 27 of this brief), shows that the north side line of the Gem, throughout its whole length, is laid near and along the center of the Kempton claim; that both its northeast and northwest corners, and the patent posts representing them, stand within the Kempton claim about midway between its north and south side lines; that the total area of the Gem claim on its survey plat, as well as in the description in the patent, is 2.16 acres; that 1.014 acres is inside the Kempton claim and patented to that claim; that the amount of patented ground of the Mountain Gem claim is but three-fifths of an acre. The maps of the respondent fail to show the real conflict patented to the Kempton, and also omits the conflict between the Mountain Gem and the Excelsior, which was patented to the Excelsior. It will be observed, also, that upon the maps introduced in evidence by the respondent the corner posts are numbered differently from their numbering in the patent itself. The effect is that upon the maps of the respondent, Exhibits "KK," "T," "S," and other maps, showing the position of the Mountain Gem claim, the boundaries of the claim have been moved to the south fifty-two feet from their real position, thus putting more of the limestone outcropping within the Mountain Gem, and diminishing the amount within the Kempton, and reducing the extent of the conflict between the Mountain Gem and Kempton, which was patented to the Kempton. For the purpose, evidently, of making plausible this change there is indicated, near the center of the moved claim, a discovery, by a point upon the map, at which point there is no work or development or discovery of any kind, and this point is fifty-two feet south of the claimed inclined discovery shaft, originally of the Gem, shown upon the Gem plat, and which is cut in two, as we have pointed out, by the south side line of the Kempton claim.

In this connection it is proper to call attention to a matter before alluded to with reference to the lack of identity between the supposed lode claimed to have been described in the location notice of the Mountain Gem and the Mountain Gem as it is described in the patent. The location notice is on a lode with a north and south strike or course. The Mountain Gem patent lode

has an east and west strike. The Mountain Gem claim described in the notice is not on the alleged broad lode with its east and west strike, but is directly across it. The fissure at the discovery point indicated in the patent has a north and south course. We think an explanation of the radical difference between the supposed lode referred to in the notice, and the alleged broad lode, and the course of the Mountain Gem as actually patented, is to be found in an investigation of the situation. An inspection of the Mountain Gem patent plat proves that between the intersecting lines of the Kempton, U. S. Survey No. 55, and the Jordan claim, Survey No. 64, and the Excelsior claim, Survey No. 366, there was a small triangular fraction of vacant ground three-fifths of an acre in extent. The Mountain Gem claim, U. S. Survey No. 475, was unquestionably made to cover this triangular fraction not embraced within the boundaries of the claims named. The lines of the survey of the Mountain Gem claim were laid on the prior patented areas embraced in the Kempton, Jordan and Excelsior claims, and so as to cover this triangular fraction, and then patent thereto was applied for, and to give a semblance of prior location to this pretended mining claim the old Mountain Gem notice of location of August 20, 1864, has been used, and made a foundation for the assault exhibited in this case on prior patents to bona fide claims patented before the opportunity for this Mountain Gem claim existed, arising from the fraction lying between their patented areas.

In addition to the erroneous positions assigned to the limestone outcrop and the surface boundaries of the claims upon respondent's Exhibit "T," there is sketched a dotted line, for the purpose of showing the course of the outcrop of the Ashland fissure vein apex. This is erroneously delineated, and as it is material in considering the position of the Ashland fissure and the extra-lateral rights belonging to it, we call attention to that matter in this connection. The line of cuts and "Stripping of apex on Ashland fissure" delineated upon defendant's Exhibit 20, and the surface cut, which extends westerly about 150 feet from the line of stripping, from a point about midway between stations 908-909, marked on respondent's map, Exhibit "T," Station 49 and "Grizzly discovery cut" agree with the position of the same, as shown upon

respondent's map, Exhibit "T." This position is further demonstrated by the relation of the surface stripping and cut, underground drifts or tunnels immediately beneath, as shown on both petitioners' and respondent's Exhibits "T" and "20" respectively. There is a radical difference, however, in the position of the eastern side line of the Northern Light claim and the southerly side line of the Grizzly claim, as presented by petitioners' Exhibit 20, and the same lines as traced upon respondent's map, Exhibit "T." Exhibit "T" indicates the apex by a dotted line, and as departing from the line of stripping on apex of Ashland fissure at a point which corresponds with station 907 on petitioners' Exhibit 20, and which is the same as respondent's Station 37, Exhibit "T." The result is that this outcrop conveniently enters the Grizzly claim from its southerly side line, passing on through the improvised westerly side line of the Ashland claim, and continuing on northerly outside, but within a few feet of, that line, throughout and beyond the northerly side line of the Grizzly claim. There are two errors in this exhibition by Exhibit "T." In the first place, the dotted line does not indicate the real position of the Ashland outcrop; and in the second place, the side line of the Northern Light is moved thirty-two feet easterly from its true position as shown by the patent plats, and as is the fact, and makes an encroachment upon the Ashland claim to this extent.

The purpose and effect, if this attempt could be successful, was to curtail the rights of the petitioners upon the Ashland fissure, and to throw a portion of the disputed ore body beneath that portion of the Ashland apex which would thus be placed within the boundaries of the Grizzly claim. To aid this effort, we have the testimony of respondent's witness Tyler (Record, page 440), in which he states his knowledge of the position on the ground of "what has been called the discovery of the Grizzly." This is found, as thus indicated upon "Exhibit T," south of the working called "Grizzly Discovery Cut." Mr. Tyler stated in answer to questions:

"I know the position on the ground of what has been called the discovery of the Grizzly.

"Q. Which Mr. Smith testified to? A. Yes, sir.

"Q. Where is it? A. It is where I hold my pointer.

"Q. Put a mark there to indicate it? A. Witness puts 'Disc.' on map.

"Q. That discovery is on the cropping of the lode? A. There is a cropping of ore at that point.

"Q. And what is its course with reference to the side lines of the Grizzly? A. Well, it would cross the two side lines of the Grizzly.

"Q. It is pretty near, as shown by the working? A. Yes, that line of working is along the foot wall of the formation there to a point marked 3; there is a shaft on a little streak of ore that came to the surface in lime."

This line referred to is what is indicated on respondent's maps as commercial lime, another belt from the belt which they called the "Broad lode." This testimony, if accepted, would make it appear that the discovery lode of the Grizzly claim passes through its opposite side lines. The purpose of this, as disclosed, was to convert the side lines into end lines. If, in addition, the Ashland fissure could be made to appear to have passed out of the westerly side line of the Ashland claim, and to enter and pass through the new side end lines of the Grizzly claim, the respondent would base thereon the claim that it would thereby become entitled to follow that portion of the Ashland to the deep, which thus crossed the Grizzly within projections of these new constructed end lines, and thereby an effort would be made to secure the ore body in dispute by virtue of a claim which the complaint alleged did not contain, for such is its effect, the apex of the ore body in dispute. The complaint alleges that while the ore bodies were beneath the surface of the Grizzly, Northern Light, Fairview and Jordan Extension claims, the apex of the vein containing the ore was as to this body of ore within the surface boundaries of the Jordan and Mountain Gem claims. Of course, to claim that the fissure through the lime in the Grizzly was the apex of the ore bodies in dispute, would be at once an ignominious surrender of all claims to the broad lode theory, and to that vein containing on its dip the ore bodies in dispute. The fact is that the Ashland fissure apex does not take the course indicated by the dotted line, and that the dotted line does not in truth indicate its position. If it did, the Ashland fissure would cross out of the Ashland claim as indicated, but, in fact, the tracing by means of

an opening upon the surface of the Ashland fissure, continues beyond the point where the dotted line leaves that working to a point upon the Ashland northwesterly side line at the easterly opening or portal of the Grizzly discovery cut some twenty feet at least beyond the point where the dotted line would indicate its crossing this side line. That the dotted line is incorrect, even when it is loosely stated to be an approximation, is shown by the fact that Mr. Palmer, who drew it, stated that in fact the apex was in the working, from which working his dotted line departed in its course. The witness Palmer placed the dotted line upon "Exhibit T" at the request of respondent's counsel, and when he did so, stated that it was only intended to be approximately the position of the Ashland fissure at the surface (Record, page 414). This dotted line from the point of departure from the stripping at Station 907, "Exhibit 20," corresponding to Station 37, "Exhibit T," as extended northerly to and beyond Station 909, "Exhibit 20," which is the end of the stripping of the apex fissure, is practically parallel to, and about twenty feet from, the actual position of the fissure as disclosed upon examination by the stripping for the distance indicated, which is about 150 feet. Perhaps, in view of the fact that it is only twenty feet away, it may be said to approximate the true position of the apex as actually demonstrated and fixed by the stripping. This change of twenty feet, however, if it could be sustained, would be most momentous in its results upon a theory to which at one time the respondent resorted when frightened about its ability to induce a court to accept its "broad lode theory," and its effort to mineralize that which nature had left barren.

Upon cross-examination, the witness Palmer testified as follows (page 417):

"Q. Does that show the fissure, that stripping upon the surface? A. Some of it does; I don't know that it all does, because there is sometimes fissure, but I think some of it shows a fissure.

"Q. Did you observe where the fissure comes through the quartzite at the top of Jordan hill? A. I did.

"Q. And that is on the line of the stripping? A. Yes, sir."

The stripping here referred to is the one we have mentioned, and it discloses the Ashland fissure apex at a distance of twenty feet or more from the dotted line drawn by Mr. Palmer as an approximation of the position of the Ashland fissure apex. This was done at the point about where the Ashland fissure goes from the quartzite into the so-called "commercial lime."

Tyler, respondent's witness, testified (Record, page 439), but was not quite willing to indicate by dotted line, that all of the apex had that approximate position, but seemed to have a vague idea that perhaps the apex had a branch. It is somewhat singular that these observant, intelligent and trained experts could not be more definite or exact concerning a matter which was evidently intended to be made of important service under certain contingencies which it was foreseen might happen in the progress of the trial. He says:

"Q. Now I want you to trace, if you will, upon this map, the Ashland fissure at the surface; you have seen the tracing upon defendant's map, have you, as exhibited? A. I believe so; they are practically the same as ours. * * * the cropping of the Ashland fissure *would be disclosed by these surface cuts*, S. 40 and S. 36; and then near station 37, and so on, I call that the cropping. This is stripped down. From S. 37 two branches of the cropping have been developed *apparently*. One is within the Northern Light claim, about there, 20 feet from point S. 49, 20 feet northerly from point S. 49, and thence on about as indicated; and thence on about as indicated by the lines of the map, which would go to the Old Jordan, again proceeding northerly, this point you spoke of being 20 feet northerly—20 feet westerly of that I should say—and went northerly."

Both witnesses concede the development of the apex of the Ashland fissure in this quartzite by the strippings as they are called, to wit, the surface workings made thereon for the purpose of defining the position of the apex.

Witnesses for petitioners and respondent agree that the Grizzly discovery cut, shown on "Exhibit T," in its course extends along the north boundary of the quartzite, called by respondent, "hanging-wall quartzite," along its junction with what is called "commercial lime" lying to the north of the quartzite, and that

the Ashland fissure from Station 49, "Exhibit T," on to the north at least to and beyond Station 910, "Exhibit 20," which corresponds with Station 216, "Exhibit T," is in limestone. The witness Palmer testified that the stripping disclosed that the Ashland apex passed through the point S.-49, "Exhibit T" This point is twenty feet to the east of the dotted line used to approximate the position of the apex, and as this dotted line proceeds to the north, it departs further to the west from the disclosure of the vein, which is made without strippings, being bare, as testified by witnesses on behalf of petitioners. (Record, page 417.) The dotted line position erroneously fixing the apex, taken in connection with the erroneous location given to the Grizzly and Northern Light lines, carries a portion of the apex of the Ashland vein where it widens in the lime beyond the west side line of the Ashland claim. It has been proven that the Ashland fissure is wider in the lime than in the quartzite, but it is not lost, nor does this constitute an anomaly in vein formation and size, as would seem to be assumed by the Circuit Court of Appeals in its opinion. The witness Palmer said (Record, page 406):

"The vein is narrow in the quartzite and porphyry. In the lime it is wider."

Moorehouse (Record, page 181) spoke of the Ashland fissure as exposed in the commercial limestone, and said:

"On the north side of the hill the fissure appearance is very wide; all of these marked 'large excavations' show fissure structure, as well as the mouth of the tunnel, and works underground in that tunnel southeasterly from stake No. 910 (Defendant's Exhibit 20) in the large excavation, and other cuts here, showed fissure structure, showing it to be very wide in that belt of limestone. * * * so, as I have said, that, it is in all probability in evidence for a hundred feet in width."

This statement of what is a usual occurrence in veins which narrow to a knife-blade width at some points, and expand into large ore bodies in others is not disputed in the record, and is confirmed by the testimony of many of the witnesses to which, because there is no dispute, it is unnecessary to make specific reference.

The discussion just made, in which we have demonstrated the inaccuracy of the dotted line, as designating the position of the Ashland fissure apex, has been upon the theory that the easterly side line of the Northern Light and the southerly side line of the Grizzly mining claims, consequently the westerly side line of the Ashland, are correctly indicated on plaintiff's various maps, including "Exhibit T," to which we have referred. The fact is that the Northern Light and Grizzly and Fairview claims upon these maps have been pushed east and south of their true positions, distances varying from thirty-five feet to one hundred and twenty-six feet, the truth of which appears from indisputable facts in the record. At the beginning of the making of the surveys from which the various maps were compiled or to be compiled, respondent's engineer Smith and petitioners' engineer Jessen met upon the ground and agreed to conduct the work together in order to avoid technical differences or any inaccuracy which might result from slight or unimportant mistakes of either working separately. This is a common practice of engineers engaged in this character of work. With this understanding the survey of the Kempton was jointly made (testimony of Smith and Jessen, Record, pages 86 and 139), all boundaries being established and properly marked, showing the claim in its true position to their satisfaction and agreement. In like manner posts Nos. 1, 2, 3 and 6 of the Ashland claim were established. Thus far the maps of the plaintiff and defendant agree. The westerly line of the Ashland from post No. 3 northerly was run jointly according to the calls of the patent survey contained in the patent, but no post was found at corner No. 4 of the Ashland claim, whereupon a disagreement arose between Jessen and Smith with regard to the establishment or re-establishment of that corner. Smith, as the evidence shows, contended for a point at which an old unmarked post was found lying loose upon the ground some distance from the point and line called for by the patent, whilst Jessen insisted (in the absence of definite monuments upon the ground) upon following the lines called for in the patent and by this means re-establishing the corners where the originals could not be found or identified. Failing to agree upon this matter, each surveyor pursued the work separately according to his own methods. Jessen completed the survey of the

Ashland, establishing corners 4 and 5, and traced back from corner 5 the easterly side line of the Ashland claim according to the calls of the patent, connecting same with post No. 6 of the Ashland previously established jointly by him and Smith. Jessen explained his method as follows (Record, page 148):

"Q. Now I call your attention to that part of the plat which purports to delineate the relative location of the Kempton, the Ashland, the Jordan Extension, the Grizzly, the Fairview, the Northern Light, the Jordan claim and the Mountain Gem claim. From what data did you make these lines of these locations—the relative position of those claims? A. In the first place my survey commenced entirely with the location of the Ashland mining claim, because I thought that its tie to the mouth of the tunnel was absolutely conclusive, and it agreed with the stakes as they stood, and Mr. Smith agreed to it that that was right, and consequently my survey from first to last commenced, in locating the claim—commenced with the Ashland.

"Q. That is the official point? A. Yes, sir; the foundation point for all the plans. The next thing Mr. Smith and I agreed to adopt a tie between the Ashland post No. 1 and Kempton post No. 3, which is given in the Ashland survey. We agreed to adopt that because that substantially agrees with the patent for the workings that show upon the Kempton, consequently from that we agreed on the position of the Kempton, that is, the Ashland and Kempton. The next thing I located was the Northern Light. Now, that I located entirely from the references in the surveyor-general's office, which gives a conflict between the Northern Light and the Kempton. My reason for doing this was this: the Fairview, the Northern Light and the Grizzly were surveyed by a deputy by the name of Thomas Davis, on the 14th day of May, 1873, and the same man, the same deputy, on August 29th of the same year, located or surveyed the Kempton. Therefore, I thought that this man Davis knew where the Northern Light was situated when he surveyed the Kempton. He says in his field notes that he placed stakes at the intersection of the two claims. They are not standing at all—no stakes, and no stake would be possible to stand as they set them here, for twenty or thirty years—twenty-nine years, but he says that he placed the intersection stakes 67 feet from post 8 of the Kempton. Therefore from post No. 8, which Mr. Smith and I established together, I put in that intersection stake, and from that followed the calls of the Northern Light patent as I found the stakes, which also agrees with another call in the patent of the Kempton, which calls for an intersection post on the end line of the Kempton, 60 feet south of post 1 of the Kempton. That was

the way I located the Northern Light. Now, after having located the Northern Light, and following out the same reasoning that the man who surveyed the Northern Light, on the same day surveyed the Grizzly and Fairview, and ought to know the relative positions; I located the Grizzly and the Fairview according to the stakes of the survey that was made at that time, and as the record shows in the surveyor-general's office.

"Q. I observe, Mr. Jessen, a conflict by your survey of the Northern Light with the Kempton and of the Northern Light with the Ashland? A. Well, that is because Mr. Smith, if I understood him correctly, to say yesterday, places the Northern Light according to this post 4 of the Ashland, which he claims to have found over here, that I know that the Ashland survey is a connection from post 4 of the Ashland and a post of the Northern Light —well, he accepts, and from that he runs his line south, according to the call of the patent, I presume, and he falls some 33 or 34 feet further east.

"Q. Than you do? A. Than what I do down here. (The witness meaning as other portions of the testimony and the maps show, the intersection of the Northern Light with the Kempton, near the south end of the claim.)

"Q. I will ask you how the survey you have made agrees with Mr. Davis' survey? A. It agrees exactly.

"Q. Agrees exactly? A. Practically exactly, and shows the same amount of conflict between the Northern Light and the Ashland.

"Q. The Northern Light and Kempton as Davis shows? A. Yes, sir.

"Q. And shows the position of the claims as his survey would show it? A. Yes, sir."

At back of brief we present a map, marked "X," upon which is shown in solid black lines the true position of the Kempton, Ashland, Northern Light and Grizzly and the Fairview mining claims, and as they were indicated by Mr. Jessen as shown in his testimony above quoted. This map is an exact copy of petitioners' several exhibits respecting the relations of the claims named. The dotted black lines are put on in accordance with the testimony of Mr. Smith, respondent's engineer, and an inspection of the map will show the differences between the position of the claims as they are and as indicated upon the maps of respondent, and upon respondent's "Exhibit T," to which we have called attention. These dotted lines upon "X" are an exact reproduction

of the position given them in the various maps of respondent. The result is that respondent's maps have placed the easterly side line of the Northern Light at its intersection with the Kempton northerly side line more than 30 feet farther to the ~~west~~ east than it should be, thus increasing the conflict between the Ashland and the Northern Light, and reducing to this extent the ground really belonging to the Ashland claim. The result of changing the position of the Ashland fissure apex some twenty feet by the erroneously dotted line and the side line of the Ashland claim more than thirty feet by erroneously locating its easterly side line, makes a combined error of more than fifty feet to the disadvantage of the Ashland, and to the reduction of the amount of the apex of the Ashland fissure within its surface boundaries as patented. The course adopted by Jessen in the re-establishing or in ascertaining and defining the position of the lines where the stakes had disappeared in the course of time, is the proper one under the law, and was as well the course required by the rule of the interior department in such matters at the time this survey was made.

Thallmann vs. Thomas, 111 Fed. Rep., 277, 282, 283.

Thallmann vs. Thomas, 102 Fed. Rep., 935.

Resurrection G. M. Co. vs. Fortune G. M. Co., 64 C. C. A., 184.

It is a general rule, in identifying the boundaries of land where a corner has disappeared, as was the case here presented, that it will be located, or its position ascertained, by running back by course and distance to established corners which are connected therewith by survey.

Dobson vs. Dinlay, 53 N. C., 495.

Doe vs. Cullum, 4 Ala., 582.

Hoffman vs. Ruble, 27 Mo., 554.

Wilson vs. Inloes, 6 Gill, 121.

Coburn vs. Cozeter, 51 N. H., 158.

The field notes and plats are, and of course should be, taken to be a part of the patent.

Chinoweth vs. Haskell, 3 Pet., 92.
Opdyke vs. Stephens, 28 N. J., 86.
Wilson vs. Hildreth, 118 Mass., 578.
Budd vs. Brooke, 3 Gill, 198; 43 Am. Dec., 321.
Chandler vs. McCord, 38 Me., 564.
Horry vs. Graham, 18 N. C., 76; 27 Am. Dec., 226.
Brown vs. Nourse, 118 N. C., 870; 24 S. E., 786.
Hanson vs. Township, 4 S. D., 358; 57 N. W., 11.
Bogley vs. Morrill, 46 Vt., 94.
Duff vs. Moore, 68 Tex., 270; 4 S. W., 530.
Johnson vs. Archibald, 78 Tex., 96; 14 S. W., 266.
Drew vs. Swift, 46 N. Y., 204.

This discrepancy, marked and important as it is, is but a part of the mislocation of the claims exhibited by respondent's maps. We invite attention to the various facts mentioned by Jessen in his evidence in proof of the correctness of the relative position of the several claims shown upon his maps, and also to the further fact that the patent of the Northern Light claim (Record, page 39) calls for an intersection of its westerly side line with the northerly side line of the Grizzly at a point upon said westerly side line distant from post No. 2 (which is identical with the southerly side line of the Grizzly) of that claim 412 feet; also an intersection of the easterly side line of the Northern Light claim with the northerly side line of the Grizzly claim at a point distant 428 feet from post No. 4 of the Northern Light; also an intersection of the same line with a point on the southerly side line of the Grizzly claim distant 840 feet from post No. 4 of the Northern Light; all of which intersections and distances agree absolutely with Jessen's survey and map. That is to say, these calls for intersections contained in the patent of the Northern Light are verified by Jessen's survey, and are located exactly where the patent calls for them when the distances contained in those calls are measured from the corner designated, and this

corner is put exactly where the patent calls for it, and by means of ties to the corners of the Kempton and Ashland upon the location of which Jessen and Smith agreed. The dotted lines upon the map, "X," present correctly the positions of all the claims, as shown by the survey of Mr. Smith, from which it will be seen that the intersections called for by the patents, and just referred to as located by Smith, differ from the calls of the patent as follows: The first distance from post No. 2 is 284 feet, instead of 412 feet; second, the distance from post No. 4 is 650 feet, instead of 428 feet; third, the distance from post No. 4 is 960 feet, instead of 840 feet; that is to say, when Mr. Smith took the corners which he adopted and measured out the calls of the patent for the intersections, he found that the intersections as he platted them were the differences between these distances from the points where they should be as fixed by the calls of the patent.. There is a slight discrepancy between the plat of Jessen and that of the Ashland and Northern Light patents at the point of junction of the Northern Light and Ashland claims between corners No. 4 of the respective claims. This is due to a slight error in running the westerly side line of the Ashland claim, as all of the intersections of the other claims, to wit, the Northern Light, Grizzly, Fairview and Kempton, agreed absolutely, as before stated, and as shown by Jessen, with the calls of the several patents. It is probable, therefore, that post No. 4 and post No. 5 of the Ashland should have been shown a few feet—not to exceed five feet—further to the west. This discrepancy is slight, unimportant, and does not impeach the accuracy of the patent calls or survey, and makes in its effect slightly against the petitioners.

In the plat of the Grizzly claim, as shown by the dotted line, its south line overlaps the Kempton claim at its northeast corner 76 feet, whereas the survey of the Kempton claim, which was made subsequent to the Grizzly survey, shows no conflict therewith, although the surveys were made by the same man, within a short time of each other, and it was the surveyor's duty, under the rules of the department, to exhibit such conflict, if any existed. (Land Office Regulations, 147 and 149, Morrison, M. Rights, page 374 of 11th Ed.) The east line of the Northern Light, at its intersection with the north line of the

Kempton, as shown by the dotted line, is laid easterly of its true position, and encroaches upon the Ashland some thirty feet.

Again, the Fairview claim, in order no doubt to make it sustain its proper relation to the Grizzly, and to have a close relation to the surface overlapping the ore body in dispute, is made to overlap the Northern Light claim, as shown by the dotted line, sixty-four feet, for more than one-half of its length, notwithstanding no conflict in fact exists between those claims, as proved by their respective patents.

When Jessen and Smith discontinued their joint survey, Smith adopted entirely different methods from those which Jessen adopted in determining the location and boundaries of the several claims. In taking corner No. 4 of the Northern Light, Smith testified he found no post or monument purporting to mark the position of that corner, but established it from its tie to corner No. 4 of the Ashland according to the official call of the patent, or the official record of the survey found in the office of the surveyor general, which is of course the same thing, but that he found none of the original corners of the claims upon the ground, nor any monument or object by which he could identify the discovery of the claim. He says:

"In locating the Northern Light, I found a cut 96 feet long, about 25 feet wide, and 5 to 7 feet in depth, at a point which I had *a reason* to believe was in close proximity to the neighborhood of the discovery." (Record, page 58.)

This is hardly as definite as we have been taught to believe should be the exact determination of the practicers of the mathematical art of land surveying. He had *a reason* which he does not disclose, which reason we are told induced a belief that he was in close, not exact, proximity to the neighborhood of the discovery. Answering a question by Mr. Sutherland, the witness said:

"Q. Now have you laid down the Northern Light claim upon this map in accordance with the data which you found upon the ground as you have described, and in its particular relation to the other claims that are laid upon these maps? A. *Well, it is not laid down with relation to anything except its individual proof;*

that is, its actual position upon the ground has been established without regard to any of the adjacent claims, excepting this tie to corner No. 2 of the Ashland, lot 67." (Record, page 81.)

The witness manifestly meant to refer to corner No. 4 of the Ashland.

In reference to the east line of the Northern Light, thus established, Smith says it accords with the official calls of the patent at the north end corner No. 4 within less than five feet, which statement agrees with the position of that line upon the map made by Jessen; but in tracing this line to the south Smith admits that its intersection with the north side line of the Kempton falls from 30 to 70 feet further east than the point called for in the Kempton patent, and this in the face of the fact that the Kempton patent, in its exclusion of conflict area to the Northern Light, calls for an intersection of its northerly side line with the easterly side line of the Northern Light at a point 67 feet westerly from post No. 8 of the Kempton claim, which Smith jointly with Jessen established in its true position a few days previous to that time.

In locating the Grizzly claim Smith says he found corner No. 1 in its true position properly marked, and from that corner surveyed the lines and established the remaining corners. The southerly side line so established, as before stated, crosses the northwest corner of the Kempton claim 76 feet south of corner No. 1 of the Kempton, although the official record shows that no conflict at all exists. This would demonstrate that Mr. Smith was mistaken in his identification of corner No. 1 of the Grizzly. Mr. Jessen, who examined this same ground, found no corner or stake or monument marking corner No. 1 of the Grizzly. This position of corner No. 1, fixed by Smith, throws it more than 80 feet from where its calls and ties to monuments and claims in the immediate vicinity would place it, as well as out of agreement to the same extent as to intersections with other claims surveyed by the same surveyor upon the same day, and the positions of which can not be questioned. An attempted justification of the conduct of the surveyor, Smith, in ignoring the calls of the patents, the official records and the rules of the land department in making these surveys, is made, by seek-

ing to show that apparent discrepancies or differences in the distances connecting the various claims with the United States Mineral Monument rendered their location upon the ground difficult or impossible of accurate determination. This attempt can not be sustained, and is misleading, especially in view of the fact that all of the surveys now under discussion, except that of the Ashland claim, were made by the same surveyor, as to three of them at the same time, and as to one within a few months thereafter. The probabilities are that the surveyor would not make more than one actual or measured connection with the Monument in surveying the different claims, and that other distances would be determined by calculations from lines of survey carried through these several surveys. It is probable, also, that the distance to the United States Mineral Monument was measured from some point on the southerly end of the Northern Light, since, as shown by elevation stations of the various maps, that line would be nearly level. The connection between the Northern Light and the United States Mineral Monument Smith determines to be 52 feet long. That is, the claim should be moved 52 feet further west than he locates it in order to agree with the distance given in the patent, from the United States Mineral Monument; whilst the Ashland claim, by the same test, should be 25 feet further away in the same direction. However, from certain corners and permanent monuments existing near the claims, and which Jessen and Smith united in identifying, the Ashland and the Kempton claims were determined by both Smith and Jessen to be correctly established upon the ground, as shown upon the respective maps, and it necessarily follows that there would remain an apparent error of 25 feet in the length of its tie to the monument. That is to say, the surveyors found the exact positions of these claims upon the ground, and then found that there was an error of 25 feet in the measurement of the distance, as recorded in the patent, from the United States Mineral Monument. Assuming the position of these two claims to be correct, as all the parties united in determining, the remainder of the group, Northern Light, Fairview and Grizzly, when surveyed and platted in their true relation to the Ashland and Kempton claims, according to the calls of the several patents, agree absolutely one with the other, excepting only the slight dis-

crepancy between the Northern Light and Ashland, found at corners No. 4 of the Ashland and Northern Light, which Mr. Smith testified was less than five feet. If 25 feet be deducted from the distance called for in the Ashland patent, in its connection with the United States Mineral Monument, the distance from any point upon any one of the claims from the Monument may be calculated with absolute certainty, and each line would be consistent with every other. In like manner, if 25 feet be deducted from 52 feet, the discrepancy which Mr. Smith found in the length of the tie of the Northern Light to the United States Mineral Monument, it will be found that the difference is the amount of encroachment of that claim upon the Ashland and Kempton claims. The same consideration pushes the Grizzly claim 101 feet north and west, throws it out of conflict with the Kempton claim, and places it in its true position in relation thereto, as called for by the patents. The Fairview, in like manner, will take its true position on the north of the Grizzly and west of the Northern Light, 64 feet westerly from the position it is made to occupy on respondent's map, by the methods adopted by Surveyor Smith. There was a practical recognition of the erroneous positions given to the several claims by the surveys of Smith, in the progress of the trial. Mr. Smith had testified (Record, page 84) that the lower west drift upon the Neptune tunnel level (purple drift, Exhibit 21) had been extended westerly in ore into and beneath the Fairview claim, whereupon his attention was directed to the fact that the respondent's maps showed the Fairview as overlapping the Northern Light claim, and occupying a position a considerable distance to the east of its true location, as shown by the patents of the several claims, and that by reason of such changed position the said tunnel of petitioners appeared to have entered the Fairview claim, whereas in truth it had not penetrated within eighty or more feet of the true southerly side line of that claim. The error was then and there admitted by respondent's counsel, and by permission of court, at respondent's request, it amended its bill of complaint by striking out the words "and the Fairview mining claim." (Record, page 106.)

Concerning the effect of conflicts, produced by thus showing the position of the respective claims different from their positions

as fixed in the calls of the patent, plaintiff's witness Smith (Record, page 94) said:

"Q. How is it as to the Kempton? A. Well, that is materially different area; there it is materially more.

"Q. How many feet more? A. All the way from 30 to 70 feet; I can not tell you specifically without reference to my plat.

"Q. In favor of the claims of The United States Mining Company? A. No—you mean the present position would be in their favor?

"Q. Yes. A. Yes; decidedly.

"Q. Decidedly in their favor? A. Yes, sir."

These questions were put to his own witness by counsel for respondent.

Respondent's Exhibit "T," and other maps which have colored upon them the ore bodies and the lime belt, omit several claims in conflict with the claims of respondent, and which are laid crosswise thereof, and upon fissures unmistakable and strongly defined ore veins which have been mined extensively for years, crosswise of the lime belt. The result is that the bodies of ore contained in these fissures, and unmistakably so, and upon veins which have been mined for from a few hundred to several thousand feet, are made to appear to have their ore bodies scattered indiscriminately through the alleged lime lode. Had these claims been placed upon the maps, with their boundaries, their relations, and the veins included within them and therein so extensively mined, their true nature would at once have appeared, with the effect that it would have shattered the apparent showing of occurrences of ore along the course of the lime belt. This is illustrated by the fact that the Excelsior mining claim, survey lot 366, which is shown by the patent plat of the Gem, marked plat C, opposite page 27 of this brief, and by defendants' Exhibits 20 and 21, embraces and includes within its patented area a large portion of the southerly half of the Mountain Gem claim as it is marked upon the ground, and yet this is not shown upon any of the plaintiff's exhibit maps whatever, with the result that the Mountain Gem seems to have an area and to contain an extent of the lime which is in fact patented to another claim. Ore bodies contained in this claim and which are upon the fissure vein known as the Rip

Van Winkle fissure, occurring in a vein crossing the limestone, are attributed by the witnesses for respondent, and evidently by the Circuit Court of Appeals, misled by this map, to the Mountain Gem claim. Again, ore bodies in what upon Exhibit "T" is represented to be the corner incline, belong to the territory patented to the Jordan claim. This is represented in the testimony of Holden, Tyler et al. to be the Mountain Gem claim. (Record, pages 348 and 430.) The ore body appearing upon Exhibit "T," at S-21, and immediately south thereof, is within the Excelsior claim, and upon the Rip Van Winkle vein. This ore body, again, is credited by Holden et al., witnesses for respondent, to the broad lime lode and the Mountain Gem claim. At cut S-22, Exhibit "T," partly in the Mountain Gem and partly in the Excelsior claim, there is coloring to indicate the presence of ore. Mr. Tyler testified there was no ore at this point. (Record, page 430.) This demonstrates that there is no ore whatever shown in the Mountain Gem claim; yet the map has been somewhat freely colored to indicate the position of ore bodies within its lines. Cut D, Exhibit "T," is shown, exhibiting a large ore body, and as being partly in the Jordan Extension, and as to the other portion of it, not shown by this map to be within any claim, as a matter of fact lies in the Excelsior claim, as shown upon Exhibit 20. A like situation is presented with reference to the Jordan claim, in its conflict with the Galena claim, lot No. 39, which is older than the Jordan lot No. 64, and has patented to it the conflict area. This conflict is omitted from the maps, and the extensive workings upon the Galena fissure, which cuts across the lime, and which has been claimed to contain an ore body within the lime lode extending from quartzite foot to quartzite hanging wall, is in fact entirely within the cross-fissure located in the Galena lode, and mined upon extensively in said Galena claim, as shown by the plat, having a course and strike corresponding with the direction of the Galena claim, and mined thence in that claim and other claims for a distance of some five thousand feet. This ore is appropriated by the maps as a fortuitous or indiscriminate occurrence of ore within the walls of the broad lode. It may be observed that the Mountain Gem appears upon Exhibits 20 and 21 in the same relation to adjacent claims, excepting its conflict with the Excelsior, as shown by respondent's exhibits. This is due to the fact that, not having been

advised in any way that the matter was one of seriousness or importance at the time, Mr. Jessen, as he stated in his testimony, platted that claim from notes obtained from plaintiffs' engineer, Smith, supposing them, at the time, to be correct. (Record, pages 163-4.)

It will be further observed that the piece of ground actually open for patent as the Mountain Gem, and as it existed at the time the application for patent thereto was made, consisted of a triangular shaped piece of ground coming to a point at the south line of the Jordan, across the north line of the Excelsior, so that the ground had no east end line, but was given one by placing its stakes upon ground which had been patented for a quarter of a century prior thereto. It requires little imagination to understand how it was that the Mountain Gem claim, which had manifestly not been worked for thirty-three years which intervened between its now asserted location and the application for its patent—for the best of reasons, that it contained nothing to be mined upon—was later revived, called back into life from the grave in which it had slept undisturbed for a third of a century, barren, worthless and unexplored, and without signs which invited the most desperate enterprise to undertake its development, in order to make it the foundation of an attack on titles long vested, upon properties mined for more than twenty-nine years at great expense, and with the result that these expenditures had been rewarded by the disclosure of the existence of large and valuable ore bodies. It is further to be observed that it is impossible that those who it is claimed made the Mountain Gem location undertook to locate it upon the limestone broad lode, for it was not suspected, much less known, until about fourteen years ago, that the limestone belt was a broad lode (testimony of Holden, Record, page 370).

Respondent's Exhibit "8," among other errors, has red lines drawn crosswise of the Ashland tunnel, the Ashland lower tunnel, the Kenipton incline, and Jackson incline, and other workings, as indicating cross veins or fissures. No evidence supports this marking of the map.

There are many other important matters of misrepresentation presented in the case, but these come up in the discussion of the

broad lode, the fissures, the character or material intervening between the fissures which cut across the limestone, where there is barren lime in fact, but with reference to which a claim is made by the maps of respondent that ore bodies extend across the same. We have under this chapter presented enough to indicate that the Circuit Court of Appeals, evidently taking the maps and surveys of the respondent as accurate, utterly misconceived the position of the limestone belt, the occurrence of the ore bodies which crossed it, the extent of the limestone outcrop in the several claims, and the position of the claims relied upon by the respondent in reference to themselves and other claims, in material and controlling ways.

13.

ALLEGED BROAD LODE.

THE LIMESTONE BELT DOES NOT CONSTITUTE A MINERAL BEARING LODE, UNDER THE MINING STATUTES, OR AT ALL. THE ORE BODIES IN CONFLICT ARE NOT PORTIONS OF THE ALLEGED BROAD LODE, HAVING THEIR APEXES WITHIN THE JORDAN AND MOUNTAIN GEM CLAIMS, BUT ORE BODIES WHICH ARE PARTS OF THE ASHLAND FISSURE AND KEMPTON BEDDED VEINS, HAVING THEIR APEXES WITHIN THE ASHLAND AND KEMPTON CLAIMS. THE CIRCUIT COURT OF APPEALS SHOULD HAVE LEFT UNDISTURBED THE DECREE OF THE CIRCUIT COURT UPON THESE PROPOSITIONS.

The petitioners maintained, and we contend demonstrated beyond contradiction, that the Ashland fissure and Kempton bedded veins, respectively, are clear, well defined lodes, bearing gold and silver, falling within the definitions of the Federal statutes, possessing all the attributes and rights of lodes, and so defined that they could be and were mined upon and followed successfully as such lodes to the ore bodies in dispute, which were

in, upon and parts thereof. We further maintain that the undisputed evidence concerning these lodes, introduced on behalf of the petitioners and as well the testimony of the respondent and the admission of the respondent's counsel, establish the existence of such conditions with reference thereto that they are and must be accepted as lodes of the character provided for by statute, recognized by science, mined by the practical miner, and determined by the courts to be the lodes which may be followed on their dip, and the ownership of whose apexes confers the right to all the ores found within them upon their descent into the earth.

The respondent, on the other hand, undertook the extensive and difficult task of proving that an entire limestone belt, lying between overlying and underlying strata or belts of quartzite, was in itself a lode within the meaning of the law, contained the ore in dispute, and had its apex within the surface boundaries of the Mountain Gem and Jordan claims, the property of the respondent, in such situation as to confer the ownership of the ore in dispute upon the respondent.

If the Ashland fissure and Kempton bedded veins possessed the qualities attributed to them by petitioners' witnesses, and also the character conceded by respondent's counsel, then, whatever the character of the limestone in which the Kempton vein exists and through which the Ashland fissure vein passes, our position is that they were lodes so separate, individual and defined as to meet all the requirements of the law, and to confer upon the owners title to the ore bodies contained within them. A determination of their character to be such as we assert, necessarily gave the right to the ore to the petitioners, and sustained the decree entered by the Circuit Court. Unless their individuality, their traceability, their capacity to be followed in their development by mining, in and through the limestone and other formations through which they pass, is disproved, and the entire limestone shown to possess those qualities and metallic contents which we have asserted are found in the Ashland and Kempton veins, the existence of these veins must be accepted as established and, we urge, the decree of the Circuit Court affirmed. Whether the lime belt and all the material lying between the two quartz-

ites constitutes one homogeneous, metallic lode, of the character described by the United States Mining Code, and therefore possessing the extra-lateral rights relied upon by the respondent, and as well whether the Ashland and Kempton veins are lodes, as asserted by the petitioners, are questions of fact to be determined upon the testimony and those principles applicable to the subject which are well settled and a part of every investigation of this character.

Bluebird M. Co. vs. Largey, et al., 49 Fed. Rep., 289.

Iron Silver Mining Co. vs. Mike and Starr G. & S. M. Co., 143 U. S., 394.

Book et al. vs. Justice M. Co., 58 Fed., 106-126.

A. FINDING OF THE CIRCUIT COURT SHOULD HAVE BOUND AND CONCLUDED THE CIRCUIT COURT OF APPEALS UPON THE QUESTION OF THE EXISTENCE OF THE ALLEGED BROAD LODE, AND ALSO THE QUESTION OF THE EXISTENCE OF THE ASHLAND AND KEMPTON VEINS, SINCE THE DETERMINATION OF THAT COURT WAS BASED UPON CONFLICTING TESTIMONY, HEARD ORALLY IN OPEN COURT BY THE JUDGE PRESIDING AT THE TRIAL.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and in doing so, and in order that it could do so, reversed that court upon questions of fact where there was a conflict in the testimony of the respective parties, or where there was in fact, at the last, no real dispute upon the facts, but unanimity of evidence in support of the petitioners.

The Circuit Court of Appeals found that there was a *broad lode*, and in making that finding says (134 Fed., 772):

"A careful examination and consideration of the *evidence* clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral-bearing rock, extending from the quartzite on one side to the quartzite on the other. The limestone has been profoundly broken, altered, and mineralized, and *has thereby* obtained an individuality which, apart from other differences, clearly distinguishes it from the neighboring rock.

There is a local absence of ore in places, a continuous occurrence of it in others, and a seeming local occurrence of it in still others, but the ore bodies are not separated, one from another, by any defined boundaries. As in Eureka Consolidated Mining Co. vs. Richmond Mining Co., 8 Fed. Cas., 819, 825 (No. 4,548), they are parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone. As shown by extensive exploration and actual mining, the mineralization has been so general that its only defined limits are the quartzite walls which bound the limestone, and within it one may reasonably expect to encounter ore by driving or cross-cutting in any direction."

This constitutes a finding by the Circuit Court of Appeals of the existence of a broad lode coextensive with the lime formation. Without now pausing to point out that the things stated in the opinion if they in reality existed do not warrant the conclusions reached, we call to this court's attention our contention that the Circuit Court of Appeals was not at liberty, under the settled practice in such cases, upon the record presented to it, to disturb or reverse the conclusions of the Circuit Court upon the question of the existence of the alleged broad lode, and upon the question of whether the limestone formation lying between the quartzite in itself constituted a single lode, and upon the question concerning the Ashland and Kempton veins which we have stated. Our position is that the Circuit Court necessarily passed upon the question of fact included in the determination, and found adversely or just the contrary result from that announced by the Circuit Court of Appeals in that portion of the opinion which we have quoted, and that this finding of the Circuit Court should not have been, and under the practice on appeals in such cases could not have been, disturbed. We base this assertion upon the following claims:

1. This case was tried before the court, upon oral evidence there introduced, upon an agreement and stipulation of the parties to the litigation that it might thus be tried;

2. There was a controversy upon these questions of fact, and the Circuit Court heard, considered and determined these questions, upon all the evidence, and found for the petitioners and against the respondent;

3. The denial by the defendant of the existence of the broad lode was fully sustained, by clear, convincing and credible evidence, not only tending to establish its non-existence, but fully sustaining the defendant's claim, so that the most that could be claimed on behalf of the plaintiff was that there was a conflict of testimony upon this subject;

4. The testimony in support of the claim of the existence of said broad lode was unreasonable, is contradictory and unworthy of credit, and in addition thereto, was flatly met and opposed by the direct testimony of a number of witnesses, so that the Circuit Court had before it for determination which witnesses could be believed and which contention could be sustained upon this conflict of testimony;

5. The testimony against the broad lode contention was not only full, complete and credible, and sufficient to defeat that contention, but met, refuted and overwhelmed the evidence in support of that claim;

6. The evidence supporting petitioners' claims as to the existence, extent and position of the Ashland and Kempton veins was full and satisfactory.

We maintain, therefore, that the Circuit Court of Appeals should have sustained, or have left undisturbed, the conclusion of the Circuit Court upon these questions of fact, and could not, without the commission of grave error and the violation of settled rules of practice in this class of cases, have found to the contrary and entered the decree which it did. We call attention to the law and the evidence in the record which we insist support these positions.

The Circuit Court, after hearing all the evidence and the argument in which the contentions were made that the lime formation constituted or did not constitute a single broad lode, and the contentions concerning the Ashland and Kempton veins, entered a general decree dismissing the bill. Preliminarily, we inquire, under the practice and authorities, the effect of this form of decree, generally, and in this case. The decree is found at page 539 of the record, and is as follows, upon the merits of the case:

"2nd. It is further ordered, adjudged and decreed by the court, upon consideration of the pleadings and all of the evidence

taken and given upon the hearing of said cause, that the bill of complaint herein be and the same is hereby dismissed at plaintiff's costs."

From an examination of the pleadings and evidence upon which the decree of dismissal is based, it is found that the issues were as we have stated.

A specific finding of fact is not required to be made in a decree dismissing a bill. While in many cases specific findings of fact are desirable as the bases of provisions in the decree, where the judgment is for the complainant, the general practice is to enter a decree of dismissal in the form adopted in this case, where, upon the merits, the finding is for the defendant.

In Beach on Modern Equity Practice, volume 2, section 806, the rule is thus stated:

"In England the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founded its decree. But in this country the decree does not ordinarily recite these, and generally not the facts on which the decree is founded. But the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record. * * *."

This court, in Whiting vs. Bank of United States, 13 Peters, 6-14, announced the same doctrine, in this language:

"In England the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founds its decree. But in America the decree does not, ordinarily, recite either the bill, or answer, or pleadings; and generally not the facts on which the decree is founded. But with us the bill, answer, and other pleadings, together with the decree, constitute what is properly considered as the record."

Equity Rule 86 provides that "In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon

consideration thereof, it was ordered, adjudged and decreed as follows, viz.: (Here insert the decree or order.)"

Gregg vs. State of Missouri, 4 Peters, 410-426.

Baker vs. Cummings, 181 U. S., 117-125:

"It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. Walden vs. Bodley, 14 Pet., 156, 161; Hughes vs. United States, 4 Wall., 332; Durant vs. Essex Co., 7 Wall., 107; Bigelow vs. Winsor, 1 Gray, 299; Foote vs. Gibbs, 1 Gray, 413; Coop. Eq. Pl., 270; 1 Herman on Estoppel, sections 151, 152."

National Foundry & Pipe Works vs. Oconto City Water Supply Co., 183 U. S., 216, 234:

"In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such cause, it must be ascertained who were the parties to such cause, what were the issues therein presented for adjudication, and what was decided thereon. It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court, in order to throw light upon the subject. Baker vs. Cummings, 181 U. S., 117; Last Chance Min. Co. vs. Tyler Min. Co., 157 U. S., 684."

From the pleadings and evidence there can be no question as to the issues, and what determination the decree made of these issues of fact. Was the Circuit Court of Appeals in a position to review the determination of the Circuit Court, and upon the evidence did it correctly do so? That the defendant introduced clear and cogent evidence, contradicting the claim of a broad lode, is beyond controversy. The most that can be urged with respect to the testimony supporting plaintiff's contention upon this subject is that it made a conflict of evidence. We believe we shall demonstrate that it does not make a substantial conflict when it is analyzed, as we attempt to do elsewhere in this brief.

What was the scope of the power of the Circuit Court of Appeals upon review of these questions? We think this is clearly

settled to be, to accept the determination of the Circuit Court, under the circumstances in this case. The principle is recognized in repeated decisions rendered by the Circuit Court of Appeals for the Eighth Circuit, in which this decision was made. We cite and quote from only a few of many decisions by that court:

Snider vs. Dobson, 74 Fed., 757-758:

"We have carefully read and considered all the testimony contained in the record, and have reached the conclusion that there were facts and circumstances developed on the hearing of the case which were fully adequate to warrant the inference that the Circuit Court appears to have drawn. The issue being one of fact, it would subserve no useful purpose to narrate the evidence in detail. It will suffice to say that the testimony was of such nature, and the circumstances under which the deeds were executed were of such character, that different, unprejudiced minds might with equal reason draw different inferences and reach different conclusions. This court, however, has repeatedly declared that where a master or chancellor has considered conflicting evidence, and made a finding thereon, the finding will be taken as presumptively correct, and will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious and important mistake appears to have been made in the consideration of the evidence. Warren vs. Burt, 12 U. S. Appeals, 591, 600; 7 C. C. A., 105; 58 Fed., 101. Latta vs. Granger, —— U. S. App. ——; 15 C. C. A., 228, 230, and 68 Fed., 69. Paxson vs. Brown, 27 U. S. App., 49; 10 C. C. A., 135, 144, and 61 Fed., 874. Stuart vs. Hayden, 18 C. C. A., 618; 72 Fed., 402, 408. McKinley vs. Williams (decided April 17, 1896), 74 Fed., 94. The same rule has been announced and acted upon by the Supreme Court of the United States on several occasions. Tilghman vs. Proctor, 125 U. S., 136; 8 Sup. Ct., 894. Kimberly vs. Arms, 129 U. S., 512; 9 Sup. Ct., 355. Evans vs. Bank, 141 U. S., 107; 11 Sup. Ct., 885. Furrer vs. Ferris, 145 U. S., 132, 134; 12 Sup. Ct., 821. See, also, Richards vs. Todd, 127 Mass., 172, and Donnell vs. Insurance Co., 2 Sumn., 371; Fed. Cas. No. 3,987. We have concluded, therefore, inasmuch as the case turned upon an issue of fact, and inasmuch as the evidence was fully adequate to justify the finding made by the trial judge, it should be allowed to stand. The decree of the Circuit Court is accordingly affirmed."

Stuart vs. Hayden, 72 Fed. Rep., 402-408:

"When the court has considered conflicting evidence, and made its findings and decree thereon, they must be taken to be

presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

Warren vs. Burt, 58 Fed. Rep., 101-106:

"Moreover, the Circuit Court investigated this question, carefully examined this evidence, and came to this conclusion. The case was then referred to a master to take an account of the profits appellant had derived from the transaction. His report was received, excepted to, and confirmed by the court.

"Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

Paxton vs. Brown, 61 Fed. Rep., 874-883.

McKinley vs. Williams, 74 Fed., 102:

"Sixth: If we were in doubt as to the existence of this alleged contract, the finding of the court below should prevail. When the court below has considered conflicting evidence, and made its finding and decree thereon, it must be taken to be presumptively correct."

Thallmann vs. Thomas, 111 Federal Rep., 277, 283.

This rule, enforcing the presumption under the conditions existing in this case, has been frequently stated and applied by this court, and its decisions so announcing are cited by the Eighth Circuit Court of Appeals in the cases we have cited, supra, from that court:

Tilghman vs. Proctor, 125 U. S., 136.

Davis vs. Schwartz, 155 U. S., 631.

Alviso vs. U. S., 8 Wall., 337.

Harrell vs. Beall, 17 Wall., 590.

Levis vs. Kengla, 169 U. S., 239.

Lytle vs. Arkansas, 22 How., 193.

Parker vs. Phetteplace, 1 Wall., 684.
Tobey vs. Leonard, 2 Wall., 430.
Albright vs. Murray, 109, U. S., 651.
Hewitt vs. Campbell, 109 U. S., 103.

The law is also thus stated and applied in other circuits than the Eighth, by the Circuit Court of Appeals:

United Trust Co. vs. Mercantile Trust Co., 88 Fed., 140-152 (Ninth Circuit).

Metropolitan Nat. Bank vs. Richards, 53 Fed., 776-778 (Third Circuit).

The case here is much stronger than those which we have cited, and the rule should, therefore, be more imperatively and rigorously applied.

The rule is made to appiy to the findings of masters in chancery, without reference to their having heard the testimony orally; and to cases where the Circuit Court considered fully the evidence and determined facts from evidence taken before examiners, and where the court had only the evidence as written down, or depositions before it, where it had none of the valuable aids afforded by hearing the witnesses testify, which are universally decided to be most valuable in weighing the testimony and in passing upon the credibility of witnesses.

In the case at bar all the evidence was heard by the court, as a result of the stipulation and agreement of the parties that this might be done. Therefore, the Circuit Court had every advantage which a trial jury or court can have from such opportunities. In no case could the advantage be greater. Here there were complicated contentions affecting showings in evidence relating to the surface and underground conditions of mines, where an accurate conception is difficult to be obtained from the nature of the case. The cause was presented by witnesses, aided by maps and other exhibits which defined and made clear to the court proceeding at the trial, the controversies and the evidence. Experts aired their theories and testified about physical facts and made applications of these facts as supporting or refuting theories under con-

sideration. They exhibited maps in plane and section, which required verbal explanations that they might be fully comprehended. The manner of the witnesses aided in testing their sincerity, their fairness, their credibility. The case was unfolded in its entirety, with all the actors and settings before the court, with time to consider, reflect upon and weigh the claims of witnesses. No printed record, no printed argument, no oral argument, can compensate for a lack of these opportunities. When the location of lines, of workings, of physical occurrences and their significance, is influential, controlling, in reaching results, the living voice, the manner, the expression, the gestures, the pointing out of important features upon maps, can not have substitutes in the machinery of an appellate court. The appellate judge can not, usually, and more especially in a case of this nature, have the advantages of the trial judge in weighing the evidence where there is conflict, and in reaching conclusions upon it. It was, therefore, beyond the power of the Court of Appeals, with all the zeal, industry and patience it may have devoted to a study and consideration of this case upon these points, and of the evidence pertaining thereto, ever to be placed in a position where it could as favorably and justly consider the issue of fact as was the trial judge. Appellate courts have many advantages in the consideration of legal questions, for they may, calmly, in the serene composure and quiet seclusion of their chambers, at their leisure, deliberate upon the questions of law which are presented to the trial court, with better facilities, greater opportunities and ampler time for correctly weighing and considering conflicting authorities and arguments in support of and against their determination, than may the trial court; but, as to the great, vital, controlling and disputed facts in issue at the trial, and concerning which often times the bitterest controversies are waged, which render it necessary to weigh with great care the evidence admitted, which only a jury or trial judge is authorized to do, the advantage is, in the very nature of things, as well as in the contemplation of the law, altogether with the trial judge. The trial court views the case from its beginning to its end, with all the innumerable matters of daily occurrence in the progress of the trial, which no record can correctly preserve or adequately reproduce, but which are and should be potent in in-

fluencing the conclusions reached by the trier of fact. It observes the conduct of the witnesses and the parties; the uncertainty of the voice at critical junctures in the evidence; the hesitancy, at times when hesitancy is of significance; the deportment, the tone, the emphasis, the action of witnesses and parties, which properly affect the human mind in passing upon the credibility and weight of evidence. The trial judges see the case and the evidence in its entirety, as a living, moving entity. The appellate court takes the case with all its living force excluded; affected by ingenious and effective efforts, on the part of those who seek reversals, to magnify the importance and influence of part, and to minimize the importace of other parts; to utilize the lack of accurate and absolute knowledge by the appellate court of what really occurred at the trial, and which was a necessary condition of the presentation of the case, in order to put in error those who were possessed of these important opportunities. It is because of these conditions, which experience has demonstrated are so often imperative and conclusive in their effect, and which it is beyond the power of the appellate court to have before it, that the appellate courts, recognizing this condition, and the rightful domain of a trial judge, who hears witnesses, accept these findings of fact as correct, treat them as verities, base with confidence their conclusions upon them, and give to those who have succeeded below upon these disputes, the rightful benefits of what the law justly and wisely awards.

We are not contending that the appellate court did not have the fullest right to inquire into the existence of evidence supporting and tending to establish the results reached by the trial court; that it was not empowered to ascertain whether in fact there was a conflict of such a substantial nature that the court was authorized, as a result of its determination of the credibility of witnesses, to adopt the view which it took of that evidence. We maintain, however, that when this substantial conflict is found, the general rule is, even where the trial court did not have the advantage of hearing the evidence orally delivered, that a presumption supports and maintains its findings, and that they will not be disturbed, save where there is manifestly an erroneous application of law to them, or it is apparent that there has been a serious misapprehension of the testimony itself. If this is the rule—and

there can be no controversy about it—when the testimony is taken before an examiner and only brought to the attention of the Circuit Court in argument upon a hearing, with the opportunity to the court to investigate the same, limited to a reading of the written testimony, how much more stronger is our position when the trial court has had the manifestly greater advantages to which we have referred; has viewed the trial from its beginning to its termination, creating its impressions, presenting its facts, enlightening the one by the other by the very method of its presentation, and wherein the court becomes imbued with and knows the case as to its facts and their application with a certainty which can not otherwise be obtained? This difference is recognized by the courts. It would seem that no argument should be required to enforce the suggestion we make with regard to the higher nature of findings under these circumstances, and the greater sanctity surrounding them when the case is brought for review to the appellate court.

In 1893 Equity Rule 67 was modified by an amendment promulgated May 15 (149 U. S., 793), providing that "Upon due notice given, as prescribed by previous order, the court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing." Complaints had been made that cases arose in which the ascertainment of the truth was much embarrassed by the fact that witnesses gave their testimony before examiners who were without power to rule upon questions, and that important elements necessary to enable a court to correctly determine the credibility of witnesses was thereby lost. It was apparent, and the result of experience, that cases arose in which it would be best, in the effort to attain the ends of justice, to take the testimony orally in open court upon final hearing, and we understand the amendment to Rule 67, to which we have referred, was adopted as a result of this acknowledged condition. The Circuit Court, in the present case, advised of its nature, at its discretion, upon the written stipulation of the parties, who thereby conceded the eminent propriety of this act, heard the whole case in open court. What weight should now be given, and should have been given, by the Circuit Court of Appeals, to the findings of the Circuit Court,

upon the consideration of conflicting testimony with reference to the alleged broad lode? When a jury decides upon a fact in a law action, or a judge authorized so to do, by stipulation under the federal statute, so decides, the finding can not be disturbed on writ of error by the appellate court. We mean where there is evidence to support the finding, or there is conflicting evidence which the court has heard and considered. The statute so provides, this court so holds, and irrefutable and inevitable logic conclude this to be the course which justice should pursue. The reasoning upon this conclusion is beyond assault. We turn to determinations upon general principles, unaided by statutes, but growing out of the nature, reasonableness and eminently just results of an investigation of the subject.

In Metropolitan Nat. Bank vs. Rogers, 53 Fed. Rep., 776, the court in effect states the position we take, of the greater weight to be given to determinations upon questions of fact by courts which have heard the testimony, and at page 779 says:

"'The facts having been ascertained by the tribunal whose duty it was to find them, they will not be set aside 'unless clearly in conflict with the weight of the evidence upon which they were made.' That such is the weight given to findings of fact in federal tribunals, Kimberly vs. Arms, 129 U. S., 525, 9 Sup. Ct. Rep., 355; Camden vs. Stuart, 144 U. S., 105, 12 Sup. Ct. Rep., 585; Crawford vs. Neal, 144 U. S., 585, 12 Sup. Ct. Rep., 759; Tilghman vs. Proctor, 125 U. S., 137, 8 Sup. Ct. Rep., 894; Callaghan vs. Myers, 128 U. S., 619, 9 Sup. Ct. Rep., 177; and Furrer vs. Ferris, 145 U. S., 132, 12 Sup. Ct. Rep., 821; and (in Pennsylvania) Logue's Appeal, 104 Pa. St., 141—will show. Certainly equal, if not greater, weight should be given to such findings where a court, not delegating its power to a master, has itself weighed the testimony, and ascertained the facts, as is here the case. Tested by this standard, the findings of the court must stand."

In United States Trust Co. vs. Mercantile Trust Co. et al., 88 Fed. Rep., 140, the determination of fact was, by stipulation, referred to a special master to take the proofs and report the same to the court, with findings of fact and conclusions of law thereon. This was to do nothing more nor different in legal effect, and as bearing upon the opportunities of the court to ascertain the truth,

than was done in the present case by the court hearing the testimony itself and making its own findings thereon. In this case the court says, at page 153:

"The effect of this stipulation was undoubtedly to constitute, to a certain extent, the special master as the judge of the facts presented to him. The scope and effect of such a stipulation is tersely stated by Mr. Justice Brown, delivering the opinion of the United States Supreme Court in Davis vs. Schwartz, 155 U. S., 631, 636; 15 Sup. Ct., 237, 239, in the following language:

" 'As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his findings, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. St., section 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; *but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable,*' citing Wiscart vs. D'Auchy, 3 Dall., 321; Bond vs. Brown, 12 How., 254; Graham vs. Bayne, 18 How., 60, 62; Norris vs. Jackson, 9 Wall., 125; Insurance Co. vs. Folsom, 18 Wall., 237, 249; The Abbotsford, 98 U. S., 440.

"See, further, Kimberly vs. Arms, 129 U. S., 512, 9 Sup. Ct., 355; Crawford vs. Neal, 144 U. S., 585, 596, 12 Sup. Ct., 759; Furrer vs. Ferris, 145 U. S., 132, 12 Sup. Ct., 821.

"So far, therefore, as the findings of fact by the special master, under the stipulation referred to, *are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding, they are conclusive and binding upon the court.*"

Moline Plow Co. vs. Carson, 72 Fed. Rep., 387-388. Sanborn, judge, delivering the opinion for the Eighth Circuit Court of Appeals, says, at page 388:

"The settled rule of the national courts is this: The findings of fact and conclusions of law contained in the confirmed report of a special master appointed by consent of the parties to the suit to report the facts and the law are conclusive, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of

the evidence. It relieves the appellate court from the *duty of weighing testimony or considering the credibility of the witnesses where there is a substantial conflict in the evidence.* Kimberly vs. Arms, 129 U. S., 512, 9 Sup. Ct., 355; Crawford vs. Neal, 144 U. S., 585, 596, 12 Sup. Ct., 759; Furrer vs. Ferris, 145 U. S., 132, 12 Sup. Ct., 821; Davis vs. Schwartz, 155 U. S., 631, 637, 15 Sup. Ct., 237."

In Colorado Fuel & Iron Co. vs. Pryor, 25 Colo., 541-551, the Supreme Court of Colorado states the rule prevailing in that court, and gives the general reasons which make it an eminently proper rule everywhere, at page 548:

"With this conflict in competent evidence on the subject of the quality of the coal disclosed in the slope, the finding of the trial judge, that it was of a merchantable grade, can not be disturbed on review. It was his province to determine this question from all the evidence in the case; judge of the credibility of the witnesses; take into consideration their knowledge and means of information on the subjects about which they testified; the acts of appellant; and from all the facts and circumstances surrounding the transaction, determine this vital question regarding the quality of the coal in the slope; and the finding of fact in this respect being supported by competent evidence, this court can not interfere by substituting its judgment for that of the trial court, upon the weight of the evidence in the case. Wallace vs. Giltinan, 18 Colo., 473; D. & R. G. Ry. Co. vs. Hodgson, 18 Colo., 117; Aspen Times Co. vs. Russell, 18 Colo., 75; Rust vs. Strickland, 21 Colo., 177."

Hazleton vs. Brockway, 26 Colo., 291-297.

Springer vs. Chicago Real Est. Loan Co., 202 Ill., 17-27.

Hardy vs. Dyas, 203 Ill., 211-215.

Boddie vs. The Brewer & Hoffman Brewery Co., 204 Ill., 352-353.

Bouton vs. Cameron, 205 Ill., 50-69.

Shea vs. Teufert, 207 Ill., 222, 225.

Lurie vs. Sabath, 208 Ill., 401-407.

Polarek vs. Gordan, 102 Ill. App., 358.

Kochman vs. O'Neill, 102 Ill. App., 475.

B.

THE LIMESTONE BELT DOES NOT CONSTITUTE A MINERAL BEARING LODE. IT IS NOT A LODE IN FACT, WITHIN THE PROVISIONS OF THE UNITED STATES STATUTE, OR WITHIN ANY REASONABLE CONSTRUCTION WHICH CAN BE PLACED THEREON. THE ORE BODIES IN CONFLICT ARE NOT PORTIONS OF THE ALLEGED BROAD LODE, BUT ARE ORE BODIES WHICH ARE PARTS OF THE ASHLAND FISSURE AND KEMPTON BEDDED VEIN, HAVING THEIR APEXES WITHIN THE ASHLAND AND KEMPTON CLAIMS.

We have suggested that the proof, so clear, conclusive and undisputed, adduced by the petitioners, establishing the possession by the Kempton and Ashland veins of every quality which is required by law to constitute them lodes, and every attribute which in practical mining is found to characterize lodes, establishes the case of the petitioners, whatever may be said on behalf of the theory, for theory alone it is, that the particular lime belt, of several lime belts in that vicinity, which respondent has selected, constitutes in itself a mineral bearing lode. Even if it were true—and the evidence demonstrates the exact contrary of this supposition—that the condition of the limestone belt was such, at a time when the minerals or solutions came up, that ore bodies were deposited in different portions of it from the fissures which led into the separated openings in the limestone, and yet there crossed this limestone, or occurred in it, defined bodies of ore, which would be recognized as lodes if they occurred in granite or other rock, with exactly the same characteristics which they possess in this territory, then these occurrences are in themselves lodes, and their individual continuity and character are unaffected by the fact that other bodies of ore, regular or irregular, occurred elsewhere in the limestone. It is in the nature of things that in the vicinity of lodes of strength and rich contents, in granite as well as in the more permeable and more readily fractured sedimentary rocks, such as limestone, there should occur bodies of

ore of greater or less extent, the exact origin of which can not always be exactly traced, but which it is known must have come through fissures and have been deposited by solutions similar to those which have operated more extensively, more connectedly, and where their source can be more readily discerned in the recognized lodes. It frequently occurs, in the vicinity of strong lodes, that there are gashes, cracks and fissures at the surface and underground, which nature has failed to enrich with ore solutions, either owing to the quantity penetrating the region or to the occurrence of obstacles which interfered with the deposition. No one will contend that these unfilled cavities are lodes. Their existence in the vicinity of similar cavities, which have been filled with ore, does not affect the fact that the cavities thus filled are lodes, nor convert the entire formation of rock, in which alike are found the mineralized and the barren fissures, into one definite mineral lode, possessed of the qualities which confer upon it individuality and extra-lateral rights.

1. We shall first seek to demonstrate, from the evidence and an application thereto of the settled doctrines of the courts, the manifest intention of the mining statutes, the scientific principles which are rightfully applicable thereto, that there is no sound basis for the contention that this particular lime belt is a lode. It is worth while in this connection to take a hurried glance at the contentions which have been presented, and have failed, since the decision of the Eureka-Richmond case, 4 Sawyer, 302, to establish the existence in apex litigations, of broad lodes, for the purpose of swallowing up and appropriating real lodes, the existence of which could not be fairly questioned, and which had been recognized by the prospectors who located the mines, by the miners who worked the same, and from which rich ore had been extracted, so as to attract the cupidity of those who invented the broad lode theory and sought to utilize it for the acquisition of ores for which they would seek in vain if they cared to go the expense of exploring their supposed broad lode within portions of where these ores, according to their speculation, should exist, but where they are never found.

In the early controversies over the application of the apex law, under the act of congress of May 10, 1872, much conten-

tion, speculation and theorizing was indulged in as to what constituted the lode, vein or deposit which had conferred upon it the extra-lateral rights provided for in section 2322 U. S. Revised Statutes. By some it was contended that the statute only contemplated the clearly defined fissures cutting through various formations; by others, that it only included what was defined by the geologists as a vein. The courts, however, quite early in this controversy, adopted the practical views which had theretofore been acted upon and have ever since been acted upon by the miner in the discovery and working of mines. From the first, connected and continuous ore bodies were recognized as lodes which might be followed, whatever uncertainty there may have been as to the exact boundaries thereof, and whether they occurred as the filling of an open fissure, so-called, or as the result of the mineralization of the walls of the fissure by solutions, or as the result of a replacement process which proceeded out from the fissure into the adjacent rock, enriching what had been barren walls, by a deplacement of the original particles with the metals borne by the solutions. A fissure without ore might for some distance preserve the identity of the lode, but no question as to the identity of the lode or its individuality was entertained when the ore was continuous, nor was its character as a lode or its extent questioned, because the exact point where the mineralization had ceased, as it proceeded laterally from the fissure, could not be by the eye, or often without careful analysis, ascertained. The great controlling, substantial and fundamental feature of the lode was the ore. That being present, that all other things necessarily existed was implied, because the ore is the very essence of lodes, and the thing for which prospectors seek, for which miners work, which the government conveyed as the chief element of its grant. It often occurs, and is the subject of comment in the reports, that the lode may consist of only a fissure traced with difficulty in one part of the lode, or in one character of formation, and may widen upon dip and strike to many feet in width, without this contraction in the one place and expansion in the other affecting in the slightest degree the identity and continuity, and existence as a lode, of the ores which are therein dis-

closed and there mined, or of the fissure in which, or in connection with which, the ores are found.

In Hyman vs. Wheeler, 29 Fed. Rep., 347, it was claimed by the owners of the Durant claim that a lode outcropped within the surface boundaries of that claim at the junction of the blue and brown limes, as they were designated, and that following this plane ore bodies existed, constituting a lode, which extended on its dip into the ore bodies mined by the owners of the Emma claim. On the other hand, it was contended that the general mass of limestone was impregnated with ore, had ore disseminated throughout it, and that the occurrence which was asserted by the plaintiff to be a lode, did not possess these qualities. This made it necessary for the court, presided over by a judge of great experience in litigations of this character, to define with care and particularity what constituted a lode, and especially where these conflicting contentions were presented. In doing this, former decisions of this and other courts were reviewed and their results condensed into what was clearly stated by the court in the charge to the jury, and which has been universally accepted as a sound announcement of the law. After referring to the fact that in the books and among miners veins and lodes were invested with many characteristics, as that they lie in fissures or other openings in the country rock, that they contain minerals differing from, or in some respects corresponding with, the country rock, that they are of tabular form, and of a banded structure, that some one of several things are commonly associated with the valuable ores, that they have selvages and slickensides in the fissures and openings, and the like, the court said, at page 353:

"A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses, who will accept that feature as establishing the fact. The party opposed will seek to disprove the proposition advanced against him, and, in addition, to show that all other characteristics of a lode or vein are in the case under consideration entirely wanting. In this way a fierce conflict of testimony is waged as to the existence of one or another distinguishing feature of a lode or vein, and the jury is asked to return a verdict upon the issue thus made. It is apparent, however, that,

upon any issue touching the existence of a lode or vein in a place designated, a question whether it has one characteristic or another is a part only of the main question, and, in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes immaterial. To illustrate that matter, it may be said that, with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be, and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its character. As was said in another case in this court:

"'A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.'

"If, therefore, we look only to the body of ore developed in the Emma location, the existence of which is not denied, and assume it to be of the form and extent developed in the works, there is no difficulty in recognizing it as a lode. Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such strata in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit. In discussions at the bar, and in the opinion of witnesses, it was assumed that the character of a body of ore, as coming within or falling without the act of congress, could be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore; and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or strata of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence, and continuance, as by assay and analysis; and certainly the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress."

The court, at page 355, quotes a charge which had been given in another case, from which quotations have been made with approval by this court, as we shall point out. The court in this case dismissed, with slight and almost contemptuous brevity, the suggestion of the general mineralization of the entire body of limestone, blue and brown.

Mount Diablo Mill and Mining Co. vs. Callison, 5 Sawyer, 439:

In this case a broad lode was asserted unsuccessfully. An attempt was made to clothe it with the attributes found by Mr. Justice Field to exist in the Eureka case. We quote some portions from the opinion which we think are especially pertinent here. In the Callison case it was agreed that the stratified slate on the south was barren, as was the green stone to the north. It was contended on the one hand that the formation intervening constituted a broad lode, and on the other that what was known as the Callison lode was, though occurring within these limits, an individual lode in itself. The court, at page 444, said:

"The Callison ore channel has been opened one hundred and seventy-seven feet in depth on its dip, and one hundred and eighty-six feet in length on its course or strike; throughout its whole extent the ore has lain on this barren white clay or porphyry, dipping with regularity to the north at an angle of about forty-five degrees. It is from two to six feet thick, and the hanging wall is this white material, before mentioned, extending on north one hundred feet or more. The ore bodies in the Mount Diablo are bounded by decomposed white rock, similar to the foot and hanging walls of the Callison, though no body so large and regular has been found as that in the Callison.

"These are the leading facts, and upon them, though the question is not entirely free from doubt, we are inclined to think, and for the purposes of this decision shall assume, that the Callison is a vein or lode separate from the Mount Diablo, within the meaning of those words as used in the acts of congress, and as interpreted in the Eureka case, 4 Saw., 302. In that case it was held that the terms, vein and lode, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

" 'It was considered in that case that the terms, vein and lode, as used by congress, for reasons there given, could not be restricted, always, to 'aggregations of mineral matter in fissures of rocks'—that is to say, to typical fissure veins—but must be so extended as to include any other aggregation of mineral matter containing ores lying within clearly defined boundaries. Such boundaries were found in that case in the quartzite on the south, and the clay-slate on the north. Between those boundaries, however, no others appeared clearly dividing the included rock or vein matter; and it never was intended in that case to hold that every metalliferous zone of country to which boundaries could be found must be regarded as one vein or lode, for this would be to reduce all mining districts to one lode."

Again, the court says:

"For, while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone can not be permitted to swallow up, under the name lode, true fissure veins found within its limits. We think the Callison claim must be regarded as being upon such a fissure, and as having unmistakable visible boundaries."

In Doe vs. Waterloo Mining Company, 54 Fed., 935, we have a discussion of the broad lode theory and of the Eureka case, too extensive to be here quoted, but in which a determination was reached entirely in harmony with the contentions we here present. The court points out the difference between the alleged broad lode in that case and the zone or lode discussed in the Eureka case, with the result that the court found that the mineral deposits which were traceable for great distances in length and depth were lodes, although there were many ore-bearing cracks and seams running out from each vein and some extending from one to the other, and that the rock in which they occurred did not constitute the broad lode contended for. In conclusion the court said, at page 950:

"It is true, throughout the liparite rock included between the foot wall of the north vein and the hanging wall of the south vein, there are innumerable cracks and seams, some of them running out from the respective veins and some of them extending from one vein to the other; and the rock in places is much broken and crushed. But there is no such general breakage and crushing, nor is there any such general and irregular impregnation

of it with mineral, or any such irregular disposition of the ore bodies, as was the case with the crushed and disintegrated limestone in the Eureka case. Here, the great bodies of ore are in and along the large veins that course through the ground in question in substantially parallel lines. There there were, in the first place, no such veins with well-defined foot and hanging walls between the boundaries of the lode, and the mineral was there disseminated almost everywhere throughout the broken, crushed and disintegrated mass of limestone. No such general and irregular diffusion of mineral through the ground here in question can, I think, be justly affirmed. Many of the little seams and cracks undoubtedly lead to ore, but I think they are properly referable to one or the other of the fissure veins, having been but the overflow of the mineralizing vapor or water when, in the course of nature, it came up from the depths below, filling the fissures that had been previously made in the rocks. Just when, and the order in which, those fissures were made and the sources from which they were filled with the vein matter, no one, in the nature of things, can exactly know. The scientific gentlemen who have been examined as experts differ in their theories respecting those matters, although they agree that it all occurred within the same geological period, which, however, may have extended, as one of them said, a million of years. The evidence, in my opinion, does not show that the same force of nature operated upon the whole mass here claimed as a lode, and at the same time. The more reasonable theory, I think, is that adopted by complainant's expert witnesses, that the fissure veins mentioned were made at different times and that each of them had its own and independent source of supply of vein matter."

In Iron Silver Mining Company vs. Cheesman, 116 U. S., 529, we have a definition of the character of a lode and an adoption and approval of the definition quoted in part by Judge Hallett in Hyman vs. Wheeler, *supra*. The court well recognized that it is not an easy thing to define what constitutes a lode or vein of mineral and quotes from it extensively. The court says:

"We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us, to which the exceptions are taken, and we give here verbatim that part of it relating to this point as found in the bill of exceptions: * * * To determine whether a lode or vein exists, it is necessary to define those terms; and as to that, it is enough to say that a lode or vein is a body

of mineral or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. *Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein.* * * * Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, *it must be that there are boundaries to such body and the lode exists.* Or if there is a continuous cavity or opening between dissimilar rocks, in which ore in some quantity and value is found, the lode exists. These propositions are correlative and not very different in meaning, except that the first give prominence to the mineral body, and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said, without proof of one of them a lode can not exist. * * * A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, it can not be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein."

In Cheesman vs. Shreve, 40 Fed., 787, it was contended that certain irregular occurrences of ore alleged to be confined to a stratum of quartzite constituted a lode, although they were not connected. The syllabus of the case states the holding of the court:

"7. SAME—VEIN OR LODE. A vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the general mass of the mountain.

"8. SAME. Ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge or vein, within the meaning of Rev. St.

U. S., section 2322, allowing the owner thereof to follow the same beyond his side lines upon its dip."

Golden vs. Murphy, 27 Nev., 379.
North Noonday Company vs. Orient Company, 6 Sawyer, 299.

Other cases in which definitions are given of lodes adopt in substance the definitions contained in the cases we have cited. We call attention to some of them, and to extracts from them in this argument, but believe that the principles to which we have called attention are sufficient guides in ascertaining the real situation in this case, upon the evidence, and whether the Circuit Court of Appeals is correct in its announcement of the existence of a broad lode, and is justified in reversing the Circuit Court upon that subject.

The Circuit Court of Appeals announces in its opinion that "The limestone has been profoundly *broken, altered and mineralized,* and has thereby obtained an individuality which, apart from other differences, clearly distinguishes it from the neighboring rock." The witnesses for the respective sides concur in describing the formation in which this controversy exists. That formation consists, first, of a layer of quartzite, then a layer or a belt of lime, which has been called commercial lime, next a layer of quartzite, then a layer of limestone, which respondent calls its broad lode; then a layer of quartzite, which respondent has designated the foot wall of its alleged broad lode. From this it appears that every layer of rock, whether it be quartzite or limestone, is perfectly individualized, identified, and has definite and unmistakable boundaries and is at once distinguishable from the rock above and below it. This character of individualism, of course, can not be claimed to constitute a lode. What, then, are the changes or elements in the so-called limestone lode which constitute it a lode, and leave the other limestone and quartzite layers without this quality? It is charged that it has been profoundly shattered and broken. This is a thing which may occur in any rock, and certainly does not convert it into a mineral lode. It is to be remarked, however, in this case, that the evidence disclosed no such shattering and fissuring of this limestone, as was pointed

out to exist in the Eureka case by Justice Field. Here the stratification remains distinct. Long workings are run, for hundreds of feet through the limestone, without timbering, as is the case in what is called "United States Tunnel No. 1, West Drift." The block character of the limestone is thus shown not to be shattered nor crushed nor reduced into a homogeneous mass, but preserves as distinct, as does the quartzite, the evidences of its formation, and the characteristics which it possessed before the fissuring which has occurred in places, but not universally, throughout the mass of the rock. It does appear that, due to some elemental force of nature, which it is unnecessary for us to discuss, there were fractures across the limestone in direct connection with which the limestone was broken, and this is exemplified in a number of localities across the limestone, in directions substantially at right angles to its general course. This occurs by way of illustration in the Galena fissure, the Ashland fissure, and the Rip Van Winkle fissure. In the Jackson incline, run upon the Rip Van Winkle fissure, the bedding of the limestone, notwithstanding the fracture which made the fissure and the crushing which accompanied it, discloses the bedding of the limestone to the lowest extent of the works. (Record, page 523.) The same condition is disclosed by the several cross-cuts or workings run out from the United States Tunnel No. 1. In fact, when a test is made of the assertion on behalf of respondent, and of the quotation made from the Circuit Court of Appeals opinion, concerning the profoundly broken and altered condition of the rock, it will be found that the limestone preserves well its original condition and bedded structure, and is not peculiar in the fact that there is found in it at places fracturings and cavities, for it is the nature of limestone thus to be affected, and especially in the neighborhood of fissures through the same.

We then turn to the only other alleged quality of this limestone, upon the existence of which there can be predicated the proposition that it is a broad lode, that is, its mineralization. It is idle to point out that it has a quartzite belt overlying it and a quartzite belt underlying it. This condition occurred when it was deposited, and it was assuredly not then a lode. It is not sufficient to point out the cross-fissuring, or any extent of fracture

which might be found within it, for these two elements combined in no sense constitute it a lode. We maintain that to the extent only that it is mineralized can any part of it be a lode, and that such parts as are thus mineralized in the manner pointed out by the courts in the quotations we have made therefrom, will constitute a lode, and not the entire mass of the limestone simply because ore bodies occur at points or localities within it. The Circuit Court of Appeals says: "There is a local absence of ore in places, a continuous occurrence of it in others, and a seeming local occurrence of it in still others, but the ore bodies are not separated, one from another, by any defined boundaries." From this quotation we apprehend it would be understood that the evidence disclosed that in a few places, so limited in number and extent that they could not affect the general character of the limestone belt, there was a "local absence of ore," and that on the other hand there was a general occurrence of the ore in the rock, so extensive, so general, that these local absences were somewhat difficult to find. It is also said that there is a "seeming local occurrence of it in still others." We have here, as the basis of the opinion of the Circuit Court of Appeals and the finding resulting from its examination of the testimony, three conditions: A local absence of ore in places; a continuous occurrence of it in others; and a seeming local occurrence of it in still others. We find it difficult to comprehend how there can be "a seeming local occurrence of it in still others." If this language is intended to apply to the Ashland fissure vein, for instance, or the Galena fissure vein, what do we find to be the facts? There is no seeming of an appearance of the existence of ore. There is a well defined fissure, recognized by every witness who testified in the case, and spoken of as the Ashland fissure and the Ashland vein by all the witnesses, without distinction. In this fissure and along it was found a real and not a phantom occurrence of ore; an occurrence of ore which attracted the attention of the prospector and induced the location of the mine more than twenty years before, according to the testimony of Mr. Holden, it was suspected that the lime belt constituted any kind of a lode. Miners worked upon it, found limits to the extent to which it could be, and was, mined, found a guide to follow in these explorations, which guide consisted of a continuous body

of ore, and this for hundreds of feet in each direction. In short, there was found exactly that condition and occurrence which this court and all courts which have been called upon to determine the question have announced is a vein, whether the exact boundaries of the ore are distinct, visible or exactly discernible or not. Another, we assume, of these "seeming local occurrences," is the Galena vein, which cuts directly across through the quartzite and the limestone and beyond, as does the Ashland fissure, with its body of ore occurring in like form, traceable in the same way, and which has been explored without doubt, hesitation or uncertainty in the minds of those who practically worked upon it for a distance, as stated by Mr. Holden, of five thousand feet. If these two fissure veins, these continuous bodies of ore, traceable by the eye, followed with certainty in mining, do not constitute lodes, then must the experiences of all men be ignored and the definitions of all courts change.

Again, there is the Kempton bedded vein with a course and strike and a continuity of ore conceded beyond all dispute and amply supported in the evidence. This body of ore has been mined upon, was located some thirty odd years ago, was patented by the United States government, has been developed until its riches attracted the attention of the neighbors and aroused the slumbering suspicions of Mr. Holden that the barren limestone within the Mountain Gem, which had never induced operations therein, was all of it a mineral lode; was, we assume a "continuous occurrence" of ore. When it is once conceded, as it must be, that the Ashland fissure is a fissure which cuts through the quartzites and limestones, that it was a channel through which came the solutions bearing the mineral which was therein and therefrom deposited, and that a like occurrence took place in the Galena fissure, in the Kempton bedded fissure and vein, in the Excelsior and others of like extent, and that, as the fact is, the limestone in the portions thereof to which such fissures do not pass, constituted that portion of it through which may be applied the statement that there is found "a local absence of ore," we have the true situation. If in granite there should be found fissures of the extent, character and relation to each other that are found with reference to the Ashland and other fissures in this district, min-

eralized exactly as these are mineralized, with the granite crushed as much and no more than this limestone is crushed, with the same and no greater local absence of ore in the body of the granite outside of the fissures and their immediate vicinity, we doubt the ability of any company to find witnesses audacious enough to assert that the mass of the granite would constitute a lode. Yet there can be, in the substance of the situation, no difference in the supposed case from the actual one.

Take, by way of illustration, and it is impossible to go into the details of each occurrence, the Ashland fissure, which Mr. Tyler traced so correctly, notwithstanding the interruptions of his counsel, the purpose of which was not at once apparent to the witness (Record, page 433), and we find that when it occurs in the quartzite overlying the supposed limestone fissure, and through which it cuts exactly as it does through the limestone, it is recognized as a lode. It there has the qualities of a lode; it is a deposition of mineral in a fissure in the quartzite. But when the same fissure, opened by the same rending forces of nature, cut its way across the limestone and was thereafter mineralized by the same solutions and at the same time, the ore bodies within it and deposited by its means, cease to be a portion of this lode and become a portion of the broad load which has no ore in it save in and in the immediate vicinity of exactly this character of fissure and opening, and yet as the Ashland fissure passes on into the other quartzite, it instantly reassumes the quality of a vein, of which it was robbed by its passage through the limestone, where its enrichment was enlarged instead of being diminished, and then again when it passes into limestone, since that limestone does not happen to be the great Jordan lode, it continues and retains its character of a recognized mineral lode. What can be justly said of a theory that thus trifles with the plainest occurrences of nature and the most unmistakable exhibitions of the continuity of ore, which is, as we have pointed out, the essential element in a lode? We have pointed out that the profound breaking of the limestone had not materially changed its character, and we now desire to bring to the attention of the court the extent of the "local absence" of ore in this broad lode. It will be found by an examination of the evidence, and we shall

call attention to the maps as a guide to this investigation, that this local absence of ore, instead of being infrequent and slight, is the substantial character of the alleged broad lode. The absence of ore in its general mass is its characteristic, rather than a continuous or even scattered occurrence of it therein. Outside of the outcroppings of the defined veins to which we call attention, in the thousands of square feet of exposed surface of the alleged outcrop of the limestone lode, there is found no single occurrence of ore. The "local absence" of ore characterizes this vast extent, and we therefore find nothing in that surface, nothing is contended for by the witnesses for the respondent, as exhibiting the existence of detached or other bodies of ore in the general mass of this limestone, or as a distinguishing characteristic of it, or at all. There are outcropping ore bodies of considerable extent, but they have their definitions, their limits, and they are contained in the veins and lodes to which we have called attention. We go under ground in the workings which have been made, for the purpose of testing the accuracy of the finding that the "greater deposit which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone." It is said in the opinion of the Circuit Court of Appeals that "as shown by extensive exploration and actual mining, the mineralization has been so general that the only defined limits are the quartzite walls which bound the limestone, and within it one may reasonably expect to encounter ore by driving or cross-cutting in any direction." Upon what may a reasonable expectation of this character be based, if it be not experience in such exploration? There is nothing, as we have pointed out, upon the surface to indicate this general and extensive occurrence of ore permeating the entire belt, with only occasional intervals of barren rock, but exactly the reverse, for there we find a general and extensive barren occurrence, with occasional interventions of ore in the veins and lodes located upon as for a distance of 1,200 feet entirely in limestone, called the United States Tunnel No. 1, west drift, beginning at station 507, upon exhibit 21, and indicated in green coloring. This drift, from this point to its breast, a distance of some 1,200 feet, is run entirely in limestone, and through limestone where occur only local ab-

sences of ore, save where it crosses the Ashland fissure at station 781, which is about 900 feet from station 507. It would seem that if this great lode is permeated with ore, save with an occasional intervening space of barren rock, that it would be expected reasonably to encounter this ore. It would be singular if for this distance through the very body of this lode, a working could be thus extended without encountering the extensive bodies which are assumed to be so generally found therein. This drift, and the portion of it to which we refer, which is shown by the absolute testimony of witnesses to be barren, save where it encounters what all recognize as the distinct Ashland fissure, is a perfect demonstration of the correctness of the contention of the petitioners. It leaves, just to the east of it, a body of ore, the evidence concerning which is referred to elsewhere in this discussion, and next in its course encounters ore at a distance of nearly 900 feet. This ore body is sometimes referred to as the isolated ore body, but is in fact and unmistakably the Ashland fissure vein. (Neill's evidence, Record p. 513).

That the mineralization occurred as to all the ore bodies which are described in the testimony, whether in quartzite, Jordan limestone, so-called, or commercial limestone, as the result of the same solutions coming up through the fissures which made way for them, and operated more extensively where the best facilities for the deposition occurred, is the consensus of opinion of the witnesses upon both sides. We do not deem it material to inquire what the forces were which uptilted the supposed horizontal stratifications as they were originally laid down in the ancient seas where it is assumed they were deposited, nor is it necessary to definitely ascertain now what caused the fissures through the limestones and the quartzites which form the channels through which the solutions came up and deposited the minerals. We think it may be taken for granted in this discussion that through such fissures whether fault or of other origin, so far as they extended to a sufficient depth, there arose and circulated the metallic vapors and solutions from which the ores were deposited, and that these vapors and solutions attacked and disintegrated more readily the limestone than the other rock, and to an extent replaced it with metalliferous and other mineral substances by means of those metallur-

gical changes which are characterized as replacement or metasomatic action. Naturally this action is more extensive in the limestone than in the quartzite by reason of the greater susceptibility of the limestone to corrosion and disintegration by the chemical and thermal forces operating upon it, and which preceded the deposition of the ore and as well accompanied the replacement. Quartzite being as a rule a harder rock than limestone, the metasomatic action or replacement would not extend in it as far from the fissure as in the limestone. Again, if the fissure crossed the formation or occurred in it, the character of the limestone would induce more extensive cavities than would be found in the quartzite. The difference, however, would be that of extent only. The result would be that the lode, while narrower in the quartzite and wider in the limestone, would be along the same fissure, and would therefore present that condition referred to in the decisions we have mentioned as something to be expected in the course of lodes and veins. There is, however, to be expected some replacement action in the quartzite. The testimony discloses that the samples of quartzite from the mines in controversy produced at the trial in the Circuit Court, and which the trial judge had the opportunity of carefully examining, had these different degrees of hardness according to the amount of silicon contained in it, and the different conditions to which it has been subjected in the change from sandstone to quartzite. It is a matter of common knowledge that quartzite varies in hardness through all degrees from a soft rock, like sandstone, to a hard flint from which the Indian fashioned his arrowheads, or which were used in the earlier days as mill-stones for the grinding of breadstuffs.

The evidence proves that large quantities of pay ore were deposited in, and were mined from the quartzite near the surface in cut "D" as it is delineated on respondent's map Exhibit "T," and from the Galena fissure, where it cuts through the limestone south into the quartzite. (Testimony of Morehouse, Record, page 449; admission of counsel, Record, page 452.) Here let it be noted are large ore bodies extending into the quartzite found outside the walls of the asserted broad lode. These occurrences, and there are others, destroy the theory that ore may be found anywhere in the limestone, but never beyond it. The processes by

which the ores were deposited in both the quartzite and limestone, being of the character indicated, and as testified to by the witnesses, makes it obvious that the limit of the mineralization or metalliferous deposition is the limit of the lode, whether the replacement be in the limestone, soft quartzite, the porphyry, or in any kind of rock whatsoever, and that all beyond this deposition is and must be country rock until another deposition from a similar fissure reaching to the deep, so as to admit the uprising solutions is encountered. The limit of the lode was ascertained by the miners, and is found as the ore gradually fades out in the barren limestone. (Testimony of Hannahs, Record, page 263, 264, 265; McNeil, Record, page 282.) Respondent's witness Tyler refers to this as a "feathering out," meaning the same thing. (Record, page 444.) This "fading out," which in itself is a demonstration of the fissure origin of the ore, occurs in the Kempton and Ashland ore bodies in dispute, as the ore bodies extend laterally from the cross fissure. It becomes poorer the further it gets from the fissure until it fades out and ceases to exist in the barren limestone country rock constituting the walls of the vein. (Testimony of McNeil, Record, page 282; Hannahs, Record, pages 263, 264, 265.) The limestone belt is not a brecciated deposit of ore, such as that which existed and was enclosed between the walls of quartzite and shale in the Eureka-Richmond case.

We have called attention to the authorities that hold that where the ore is found the boundaries are implied, and it is not necessary to find them in the absolute faces of the fissure walls. From the evidence there is no reason to doubt that the Kempton and Ashland lodes are distinct from all other lodes in that region and intersect upon their dip and strike in the manner disclosed in the testimony, and to which we have called attention in the statement of the case. The main ore body is an enlargement laterally of the Ashland fissure, but is none the less absolutely a part of that fissure or lode. It would be remarkable if it could be successfully contended that the ore in the fissure could be called a lode, but that the ore which extends from this same body into the walls by the method of replacement is not the same lode, although all of this ore is due to the same solutions, coursing through the fissure at the same time, and is all deposited as the

result of one and the same operation. But it is contended that the fissure which ~~expands~~ extends from where it is encountered in the narrower portion of the lode down to where it expands into the extensive ore bodies thus far disclosed in the wider portions thereof is lost and thus ceases to be the same lode. An examination of defendant's map (Exhibit 20), and the testimony concerning the occurrence, shows that the Kempton, Sampson and Ashland fissures approached nearest together in the Kempton ground, but in their strike therefrom northerly, they diverged, the Kempton and Sampson having thence a northeasterly strike, and the Ashland a more northwesterly strike. (Morehouse's testimony, Record, page 199; Hazelgrove's, Record, page 272.) In addition to the proximity of the three fissures at the outcrop of the ore in the Kempton ground, there is an intrusion of porphyry in sheet form coming from the deep in the neighborhood of the Ashland fissure, clear to the surface in Kempton ground near the Dunstan shaft and stope. (Testimony of Wall, Record, pages 289, 299.) There are other sheets of porphyry, also up-thrusted through the limestone. (Testimony of Wall, Record, page 289.) These occurrences have fissured and in connection with the fissures to some extent shattered the limestone beds through which they passed, so as to facilitate the circulation of the solutions, which we assume, and the testimony discloses it was the opinion of the experts were ~~was~~ the direct and proximate causes of the ore deposits such as we now find enclosed by the adjacent solid limestone or country rock. The ore body in controversy is embraced in and limited by the limestone country rock which is barren in itself, and possesses no quality which in any way distinguishes it from the country wall rock of the lodes, and possesses no indication that it is in itself a mineralized lode.

The Neptune tunnel, run on the lowest level of these mines, and which strikes into and develops the ore vein at about four hundred feet beneath the surface of the earth, has its portal in the quartzite about five hundred feet south of where it enters the ore channel and tunnel in Kempton ground. (See Exhibit 20, at the back of this brief.) This tunnel from its portal extends north 198 feet in the quartzite as measured by the witness Morehouse. (Record, page 474.) From the contact of the quartz-

ite with the limestone the tunnel extends north, through barren limestone 300 feet, where it intersects the ore channel near the Sampson fissure in Kempton ground. (Testimony of Morehouse, Record, page 475; Beveridge, Record, page 497.) Here again, we have 400 feet of limestone penetrated by this tunnel without an ore occurrence or the occurrence of anything but barren limestone, and the barrenness of this limestone is proved by the assays of it taken by the witnesses Morehouse and Beveridge. (Record, pages 475, 496.) This is a somewhat extensive local absence of ore, and manifests a decided break in the continuity of the mineral supposed to be found in the limestone lode. On the level above the Neptune tunnel level, namely, the turn-sheet level, the south wall of the ore vein is in the limestone at point 414. (Testimony of Hannahs, Record, page 263.) On the west side of the Sampson fissure the west ~~of the~~ drift on the Neptune tunnel level extends westerly through from 120 to 180 feet of barren limestone, and then encounters the easterly limit of that level of the ore body in question in the Ashland fissure vein. (Testimony of Tyler, Record, pages 445, 446; Hannahs, Record, pages 264, 265.) Further to the east than the "East drift" is the "Rip Van Winkle" cross-cut, which cross-cuts the limestone throughout the entire width of the Kempton claim, and connects the Jackson incline with the United States Tunnel No. 1 West drift. The "Rip Van Winkle" cross-cut is entirely in barren solid limestone country rock. (Testimony of Legg, Record, page 503; Wall, Record, page 523; Petitioners' Exhibit 21.) In addition to the "East" drift, and the "Rip Van Winkle" cross-cut, there is the "Emma West Drift," shown on respondent's map Exhibit KK, which discloses in its course barren stratified limestone. Thus by these workings it is shown that the whole eastern end of the Kempton claim east of the Sampson fissure is barren limestone. Nothing else is disclosed by the workings. We challenge the right of the respondent to assert or assume that in this body of limestone thus retaining its original structure unfractured and barren, there may be, though not found by any disclosure or symptom of its existence, ore bodies.

We have a right, we contend, to claim that the portion of the Kempton claim east of the Sampson fissure, which comprises more than

one-half of its area containing the alleged "broad lode," is barren limestone, because that is the condition disclosed by the surface, and by all the workings running through it. It has not been opened up by any drifts or tunnels through it, save the east drift of the "Rip Van Winkle" cross-cut, and the "Emma West drift," during the thirty years and more that it has been possessed by the petitioners and their predecessors in title. The reason for the failure to further explore this barren and unproductive limestone is that the mining within the claim has demonstrated that there is nothing in that territory to prospect for, or which can be reasonably expected to be found. The evidence shows that nothing can be found throughout its entire extent, but a solid wall of stratified barren limestone, except in the small Rip Van Winkle fissure developed in the Jackson incline, which, acording to Tyler's testimony, is an independent mineralized fissure in the limestone between limestone walls, the ore having structure lines, parallel with the walls of the fissure. (Tyler's testimony, Record, pages 460, 461.)

We return to a more detailed exposition of the disclosure made by the United States Tunnel No. 1, west drift. This tunnel lies north of the ore body in dispute, and extends, as we have pointed out, about 900 feet along the strike of the limestone belt at nearly the same level as the Neptune tunnel. (Exhibit 21.) From point 507 in the United States tunnel to point 637, is in barren limestone sampled by the witnesses Morehouse and Beveridge. Point 637 of United States Tunnel No. 1, west drift, is on the line of the Sampson cross fissure, and there is, of course, some pay ore found there, just where it would be expected to be found, whether the rock in which it occurs is limestone, quartzite or other formation. From point 637 to point 781 in No. 1 West Drift the distance is approximately 420 feet, and the opening discloses only solid barren limestone country rock. (Testimonyof Morehouse, Record, pages 478, 479; Legg's, 503, 504.)

Tyler, testifying for respondent, gave this evidence:

"Q. Now let us proceed, Mr. Tyler, from station 637, in the west drift, and go west into the west drift to the isolated ore body in the Northern Light ground; how many hundred feet of barren

limestone do you find from 637, for example, to 781? A. There is a good many feet of limestone there.

"Q. A good many feet of barren limestone—several hundred feet of barren limestone? A. But there may be ore right under it, beyond that, that is over the lode; that is a part of the lode.

"Q. Whether there will be or not is a matter of speculation? A matter of speculation until it is developed by workings? A. That is true. (Record, page 446.)

Here was a witness closing his eyes to the unmistakable country rock, to the character of the limestone opened up by this extensive working, solacing his conscience for contending that all the limestone was a lode by the speculation that there might be ore elsewhere in the limestone. Of course, there was ore disclosed in workings existing in the Kempton and Ashland veins. But the "~~un~~reasonable expectation" upon which reliance was placed, must have been somewhat checked and cooled by the failure and unreasonable failure to find that which it is contended might so reasonably be expected. How many disappointments of this character resulting from actual development directly contradicting the reasonableness of the exception must be made, before the expectation ceases to be reasonable?

It would seem that enough ought to have been disclosed by the workings to which we have referred and shall refer. The result of this evidence is a demonstration that nothing but limestone country rock exists to the north of the ore body from point 637 to 781, a distance of over four hundred feet, and that when the ore is found, it is the Ashland fissure lode. (Testimony of Tyler, Record, page 446.)

Turning to the west Ashland fissure, like conditions are found. The west drift on the Neptune tunnel level is driven through the ore body westerly until it struck into the barren country rock or wall of limestone to the west. (Testimony of Hannahs, Record, page 264.) In the upper Ashland tunnel, shown on Exhibit 21, at point 606, a drift was run west eighty feet, and at the west end the ore diminished to a small seam about six inches wide, and was evidently fading into the limestone. (Testimony of McNeil, Record, page 282.) Thus the evidence shows that the ore of the tunnel in question, the lode in dispute, the ore body involved

in this litigation, is embraced on all sides by limestone country rock, and is not an ore body without separation from other ore bodies in one grand lode.

The substance of respondent's proposition is that the limestone belt was so crushed, fissured, faulted and chemically altered, as to be a lode within the meaning of U. S. Revised Statutes, and according to the understanding of miners and of men of science. The greater part of the evidence adduced by respondent was directed towards proving the conditions in the limestone belt thousands of feet, and in some instances miles away from the Kempton and Ashland claims. This evidence was too remote to affect the ground in controversy, did not establish the contention of respondent, while that contention was absolutely refuted by the disclosures in, and in the immediate vicinity of, the ground involved in litigation. The nature of the case forever and absolutely precludes the proof that limestone, whether chemically altered or not, is a metalliferous rock in the sense of the statute.

Limestone is not one of the metals designated in the statute as the subject of lode location.

> Wheeler vs. Smith, 32 Pac., 784.
>
> Long vs. Isaksen, 23 Land Decisions, 353, 357.
>
> Wheeler et al. vs. Smith, 23 Land Decisions, 395, 399.
>
> U. S. Revised Statutes, section 2320.

In fact, the fissures are, and are necessarily, the controlling factors which have determined the presence of ore bodies in the limestone and as well in the quartzite in this region. In the particular ore body in dispute, it is the "Ashland fissure," and the Kempton fissure, called the "Kempton bedded vein," which have determined and caused the extent and existence of this ore body.

In a recent decision by the Supreme Court of Utah, the contention that a zone alleged to consist of crushed, fissured and chemically altered limestone, was a lode apart from the ore vein or channel which occurred in the limestone, was emphatically and distinctly repudiated, and it was held that the case disclosed a replacement or substitution vein, originating from metasomatic

processes, and that the limits of mineralization were the limits of the lode. The formation in that case was similar to the formation here, except that the limestone belt was of considerably greater width than the limestone belt here under consideration.

The Supreme Court of Utah, in discussing a case involving somewhat similar questions, said (page 676):

"In determining the question before us, however, whether the finding of the court was warranted by the evidence, it is important to consider what constitutes a vein or lode. It will hardly be contended that, merely because rock is broken, crushed, shattered, and even fissured, it constitutes a vein within the meaning of the laws of congress. All miners of any experience, as well as men of scientific research, know that such occurrences may be found in the most barren country. Something more is necessary to dignify that kind of material with the character of a vein or lode. The material, whatever else may be its condition, must be metalliferous—must contain some kind of mineral value, so as to distinguish it from the country rock; and especially is this true where there are no well-defined walls. * * *

"The books tell us that vein-making fissures have been formed by contraction on drying, as in argillaceous stratum, or on cooling from fusion, or from heat attending metamorphism; by subterranean movements, pre-eminently those which have attended mountain making; by the disruptive or expansive action of vapors resulting from volcanic action, and by corroding vapors, or by solutions from the deep, which sometimes enlarge the fissure, especially where the rock is limestone. (Dana Manual Geol.) * * * (Citing, also, Iron Silver M. Co. vs. Cheesman, 116 U. S., 529, etc., concerning definition of 'lode.')

Page 679. "Upon very careful scrutiny of the evidence, we are of the opinion that the court did not err in rejecting the theory that the limits of fracturing constituted the limits of the vein, nor in holding that the vein existing in the south end of lot 38 did not continue in that lot north of the north end of the Cunningham stope. Where, then, and in what direction does the vein proceed on its strike from that stope, and where are its boundaries or limits? That the Mammoth vein was formed by replacement, by replacing the limestone, molecule for molecule, with mineral through the thermal and chemical waters, or corroding vapors or solutions, ascending from the deep through the fissure, or series of fissures, constituting the lode, and that where the ore appears the fissure or opening was widened and large cavities created and

filled with ore through metasomatic action, appears manifest from the evidence. The acid and corrosive solutions acting upon the limestone corroded it, or dissolved it, and the limestone thus precipitated the ore by depositing it out of the solutions. Thus, evidently, the ore bodies were built up particle by particle by dissolving the limestone and precipitating the ore, or by replacing the limestone with ore. It appears in evidence that great masses of ore are found in which the original bedding planes can yet be traced, these planes not having been obliterated by the metasomatic change."

Grand Central M. Co. vs. Mammoth M. Co., 83 Pac. Rep., 648, 676-679.

Substantially all these phenomena thus referred to as being proved by the evidence in that case, are proved by the evidence in this case, and the argument and conclusions which the Supreme Court of Utah derived from that evidence, support the arguments and conclusions which we derive from the evidence in this case.

The scientific meaning and implications to be derived and deduced from much of the testimony of these witnesses are to be seen by reference to authentic and standard works of science. Thus the nature and origin of ore deposits such as exist here are explained in the American Encyclopaedia, under the title of Mineral Deposits, thus:

"In Nevada and Utah some very rich mines have been worked in deposits of ore, of which the true character has been imperfectly understood, and very much misjudged. These are the chambers of or pockets of ore so characteristic of the White Pine district, Nevada, and Little Cottonwood canon, in Utah, the latter including the famous Emma mine, and these districts have been the center of intense mining excitement and scenes of the wildest speculation, of the most unparalleled successes, and sudden and complete failures. A large part of this history has been consequent on the peculiar nature of these mineral deposits. In both these districts the ore occurs in limestone and often in chambers frequently of considerable size. These when first opened were supposed to be of limited extent and were soon worked out. The relations of the ore chambers of White Pine and Little Cottonwood to the silver-bearing fissure veins of Nevada and Utah are not at first sight apparent, and yet they are unquestionably products of

the same general cause. The true theory of their deposit is probably this: The "country rock," i. e., the rock enclosing the deposits of ore, unlike that of the most of the mining districts of the West, is limestone. Many limestones are soluble in atmospheric water, which holds carbonic acid in solution. In some limestone countries the underlying rock is honeycombed by caves and subterranean galleries, forming a system of underground drainage. The table land of Kentucky affords a typical example of such region, and the Mammoth Cave is only one of an immense system of natural sewers by which the drainage of the surface is effected. If, now, the Kentucky table land were much disturbed by an earthquake and fissures were opened through the limestone, and these fissures were filled to form mineral veins, then, wherever these fissures communicated with the subterranean chambers and galleries, these would also be filled with vein matter and ore, and a condition of things would be produced similar to that we now find in Utah and Nevada, though on a much grander scale. With this explanation the western pockets and chambers of silver *ore are seen to be the natural offshoots and appendages of the fissure veins so common in the region where they occur.*"

Volume 11, American Encyclopaedia, page 560.

So, too, the reports of the United States Geological Survey in that part of it which relates to the economic geology of the mining district in which these claims and mines are situated, and which refers to these very claims and mines, report that the ore bodies in the Kempton and Ashland are the natural appendages and offshoots of the northeast and southwest fissures or fractures which cut across the limestone and quartzite. This report speaks of the Kempton ore bodies as follows:

"This mine, comprising the Old Neptune and Kempton properties, is situated on the north side of Bingham canon, in the Jordan limestone, immediately west of the Old Jordan and Galena mine. * * * The ore bodies of the Neptune have formed in the Jordan limestone along northeast and southwest fractures, and extend out from these fractures along the limestone beds. Minor mineralization occurred along fractures, which are parallel to the strike and dip, and steeper than the bounding limestone. Judging by stopes, the largest sulphide bodies lie along a strong northeast-southwest zone of fissuring at two levels; the lower, as indicated by the 'big stope,' shows a widening of the normal, tabular fissure ore body laterally into the limestone to form a thick lens elongated in the

direction of the dip. * * * In brief, the bodies of this mine exemplify fissure as well as bed or replacement bodies, and present, also, intermediate stages in which banding of ore may be traced from fissures out along bedding."

Economical Geology Bingham Mining District, 1905. Professional Paper No. 38, pages 242, 243.

"Fissures" occur in all parts of the earth's crust and in rocks of all constituent varieties, and by themselves are considered mere water-ways. It requires the introduction of valuable minerals within these caverns to constitute the miner's lode.

Witnesses for both plaintiff and defendant agree, that the ore bodies in dispute, both in the Kempton bedded vein and in the Ashland fissure, are of the class known as "replacement," or "substitution" veins, commonly referred to as "metasomatic replacement" ore deposits.

Of this class of ore deposits (replacement veins), the late Professor Joseph Le Conte, author of a standard text book of recognized authority, entitled "*Elements of Geology*," following an extended discussion of the various types of ore deposits, says (page 257):

"* * * in certain country rocks soluble in water, especially limestones, the rock is dissolved along the waterway, and the vein-stuff deposited *pari passu*, giving rise to what are called *substitution-veins*. In short, once conceive clearly that mineral veins are filled waterways, and all these complex phenomena solve themselves."

James F. Kemp, professor of geology in the School of Mines, Columbia University, in the latest edition of his work entitled "The Ore Deposits of the United States and Canada," pages 44-45, says:

"The conception of replacement is one that has been applied of late years by some of the most reliable observers. About 1873 it appears to have been first extensively developed by Franz Posepne, an Austrian geologist, in relation to certain lead-silver deposits at Raibl, in the province of Kaernthen. About the same time it was suggested by Pumpelly, then state geologist of Missouri, to Adolph Schmidt, who was engaged in studying the iron deposits of Pilot Knob and Iron Mountain, and by Schmidt it was con-

sidered applicable to them. Some ten years later, J. S. Curtis, at the suggestion of S. F. Emmons, based his explanation of the formation of the Eureka Nevada lead-silver deposits on the same idea, and, according to Emmons (1886), it holds good for Leadville.

"R. D. Irving, who credited Pumpelly with bringing it to his attention, published in 1886 an explanation of the hematite ores of the Penokee-Gogebic range, in which the idea is applied, and Van Hise has since elaborated it, *in the process of replacement no great cavity is supposed to exist previously.*"

"There is little, in fact, but a circulation or percolation of ore-bearing solutions, which exchange their metallic contents, molecule by molecule, for the substance of the rock mass, we would not ordinarily ~~except~~ expect the ore body to be as sharply defined against the walls as when it fills a fissure, but rather to fade into barren material.

"The chemistry of the replacement process is none too well understood, but it presents fewer difficulties when applied to a soluble rock, like limestone or dolomite, than when rocks composed of silicates and quartz have given away to ores.

"* * * in the alteration products abundant opportunity would be afforded for the precipitation of sulphides, which would, in part at least, replace the rock. Along a crack or line of drainage, *definite walls would thus easily fade out.*

"Such phenomena are afforded by innumerable ore deposits, and often come under the notice of every one familiar with mining."

In a late volume (1904) issued by the Department of the Interior "United States Geological Survey," S. F. Emmons and C. W. Hayes, geologists in charge, in regard to the origin of the ore deposits of Bingham it is said (page 238):

"It is sufficient for the present purposes to state that in general it appears that the large bodies of copper ore were formed through replacement of limestone, directly or indirectly, under the influence of igneous magmas; that the argentiferous lead ores were deposited from aqueous solutions in the northeast-southwest fissures, mainly by filling, partly replacement."

Again, in a volume issued by the Interior Department (1905), entitled "Economic Geology of the Bingham Mining District," by *John Mason Boutwell*, geologist in charge, page 251, referring to ore occurrences in the so-called Jordan lime, it is said:

"The ore appears to have made from fissures along more replacable members of the limestone, and thus to have formed a succession of tables branching from the fissures, * * *. Evidences that the ore was formed by replacing limestone are so numerous and distinct as to warrant special mention. They are of two classes:

"(1) Those which show retention of sedimentary structure by ore, and

"(2) Those which show the character of the country rock before mineralization. Thus ore occurs in sharply defined bands between unmineralized bands of limestone; one occurrence exhibits bands of unmineralized limestone that became gradually more and more mineralized until solid mineral alone remains, which preserves the same structure that is noted in the unmineralized limestone."

Again, referring to the ore deposit in controversy in this action, under the name Neptune Kempton Mine (the name usually applied locally by reason of the name given to a claim covering the same ore body and owned by the same parties but subsequently merged in the Kempton claim), page 242, it is said:

"This mine, comprising the old Neptune and Kempton properties, is situated on the north side of Bingham canon, in Jordan limestone, immediately west of the Old Jordan and Galena mine. * * * The ore bodies of the Neptune have formed in the Jordan limestone along northeast-southwest fractures and extend out from these fractures along the limestone beds. * * * In brief, the bodies of this mine exemplify fissure as well as bed or replacement bodies, and present, also, intermediate stages in which banding of ore may be traced from fissures out along the bedding."

In the questions propounded by respondent's counsel, implied assertions were made, and we presume will be presented to this court, to the effect that for thousands of feet from given points tracings were made of ore in the lime belt, thus creating the impression, and as we understand asserting the position, that this extensive continuity of ore was disclosed within the limestone. When witnesses were questioned, and the workings through which these tracings are claimed to have been made are examined, in the light of the testimony, it will be found that the tracings were made by openings which extended from ore bodies

through barren, unaltered limestone for hundreds of feet, to the next ore bodies occurring in other lodes. A tracing of this character does not disclose that continuity of ore which is essential, in this kind of lode, to the demonstration of its existence. In the Eureka case, the strong and controlling elements which induced the court to designate the zone as a lode, were that ore was found everywhere throughout the zone, which was everywhere changed and mineralized, and was not found at all beyond its limits, as defined by the two formations above and below it. See also Richmond M. Co. vs. Eureka Con. M. Co., 103 U. S., 839. In this case the ore bodies extend across the limestone into the quartzite. They do not respect the alleged boundaries called its walls. Ore is not found everywhere, and can not be reasonably expected to be found everywhere, within it, for this expectation is directly refuted by the disclosures made by the workings, and it is found outside of it. This demonstrates that the quartzites, upon either side, do not constitute the walls of the lode, but are penetrated by the ore bodies, and are as much distinct lodes as it can be asserted the limestone is. We have pointed out the large ore bodies in the cuts and openings which are in the quartzite, and which extend across the contact between the quartzite and the lime. In addition to those workings which we have specifically pointed out as demonstrating the vast stretches and extents of barren limestone between the ore bodies, other workings make like disclosures, as the evidence to which we have referred demonstrates.

In response to the assertion that there are no defined limits to the ore bodies separating them from the other ore bodies, or defining their extents, we call attention to the fact that stretches of barren limestone, from a hundred to several hundred feet in extent, lie between any ore disclosed in the one ore body and the next ores found in the next occurring ore body. In some instances these ore bodies are definitely defined by the walls of the fissures; in other instances what were the original walls of the fissures have been mineralized by the replacement process testified to by the witnesses and called to the court's attention in this brief. This existence of the ore is necessarily a part of the lode, and is a part of the same ore body which lies within the walls of

the fissure. The ore in the fissure, and in the walls, converted into ore, was deposited at the same time, by the same process, and constitutes part of the same lode.

We have not in this discussion taken up the references to the testimony made by the Circuit Court of Appeals, because necessarily that and other evidence bearing upon the same subjects has been discussed extensively. We call attention to the fact, however, that the quotations from and interpretations put upon the evidence of the witnesses, disclose that the court has misapprehended the true meaning therof, as is found by a reading of the entire testimony in connection with the portions commented upon.

C.

THE ASHLAND FISSURE LODE.

It is very manifest from the pleadings and the evidence that the ore bodies in controversy are largely parts of the Ashland fissure. The amended answer of the defendants avers "That a large lode or vein of mineral and metal bearing ores of earth and rock in place containing gold, silver, copper, lead and other metals, exists and is found throughout more than nine hundred (900) feet in length of said Ashland claim and location, so as aforesaid owned and possessed by said Ivanhoe Mining Company and its lessee, Enos A. Wall. That the same in its strike passes through the southwesterly end line thereof, and has its top or apex within the side lines thereof, throughout the entire length aforesaid, that the general course or strike of said lode is nearly or quite parallel to the side lines thereof, and said Ivanhoe Mining Company and the said lessee, the defendant Wall, are entitled under the provisions of the laws of the United States, and the terms of the said patent granting said mineral land to the predecessors in title of said Ivanhoe Mining Company and said lessee, the defendant Wall, to the whole of said vein or lode on its dip beyond the vertical side lines of said claim throughout its entire depth, and within the limits of the protractions of the said end lines as aforesaid, and to all the metals and the mineral and metal bearing ores, earth and rock therein contained.

Third. And these defendants further allege and show, that said vein or lode in its descent into the earth departs from a perpendicular, and has an inclination or dip from the horizon of about 70 degrees in a northwesterly direction, and in its dip passes out of and beyond the northwesterly vertical side line of said Ashland mining claim and premises insomuch that it passes underneath adjoining surface ground, but within protractions of the end lines of the said Ashland claim on the surface extended downward vertically, and so continued in their own directions, that they include the part of said lode which lies between vertical planes drawn downward through said end lines, and that such planes do intersect the exterior part of said lode or vein on its said dip outside the said northwesterly side line of said Ashland mining claim, underneath said adjoining surface ground, known as and called the Grizzly claim, the Northern Light claim, and the Fairview claim hereinafter mentioned." See Paragraph Second and Third of Answer of Ivanhoe Company, in Amended Answer, Record, pages 32-33.

At the trial in the Circuit Court the existence of the lode thus pleaded in the Amended Answer was admitted. The testimony of respondent's witness and managing director proves this with certainty as follows:

"Q. If, as certain witnesses have said, that there is a fissure here with ore stratified with the fissure, can you say that that is the same as the lode running north and south? A. It is surely easy to tell that that is the same lode as this.

"Q. This lode that runs north and south? A. Near the north and south, Ashland fissure, is a fissure I have specified coming later, and is proved to be later than the Jordan lode, and it passes through and is seen in the foot wall and hanging, but it is not that ore body we are talking about.

"Q. It is a different lode, then, from your Jordan and Telegraph lode? A. Oh, it is a different vein entirely.

"Q. A different vein? A. Yes, sir. The Ashland vein can be followed for quite a distance into the Big Jordan lode and can be traced. It is like all of these fissures; it is somewhat difficult to follow through, but the way we do trace them we get a line from the quartzite on either side, or from one quartzite wall and follow that line out, but we can't always find the limits of the fissures which we take to be one of the cross-fissures.

"Q. You do admit, do you, that the Ashland fissure is a different lode from the Jordan lode? A. Oh, there is no question of it here at all."

(Testimony of Holden, Record, pages 367-368.)

It was also admitted at the trial that the Ashland fissure is a metalliferous lode as follows:

"Now I wish, Mr. McNeill, you would describe what you know about the continuity of the vein from the top, where you say you mined the croppings in 1884, down to the lower workings, and their connection with the lower workings in the Ashland fissure, if you know it.

"By Mr. Dickson: As to the continuity of the ore, speaking of the bed vein or the fissure vein as testified to by other witnesses, we do not dispute, we do not question." (Record, page 282.)

This testimony and admission agrees with the pleading above set out, and with the testimony of the witnesses for petitioners. These admissions were made however, we think was afterwards disclosed for the purpose of laying the foundation for subsequently asserting for respondent, extra-lateral rights of the Ashland lode, in virtue of asserted apex thereof in Grizzly ground. The respondent has not pleaded rights under any lode which has its apex in the Grizzly claim, but at the trial the foregoing admissions were made, and then respondent attempted to prove that the Ashland lode has its apex in Grizzly ground in such wise, as to give the Grizzly claim extra-lateral rights in the Ashland lode as against the Ashland claim, which it is asserted, is effectual to take from petitioners the right to the ore body in dispute. We have pointed out this attempt under the discussion of the misrepresentations made by respondent's maps, etc. The form and substance of this claim by respondent appears from the proceedings in the record which relate to this subject.

(Palmer, Record, pages 414-417-425.)

The respondent then attempted to prove by the witness Tyler, that the side lines of the Grizzly claim are in fact its end lines, and that the Ashland lode apexes in the Grizzly claim. This we

have discussed in connection with the tracing of the Ashland fissure apex by Palmer.

(Testimony of Tyler, pages 439-440.)

The record thus made by the respondent is in logical and legal effect as follows:

First—It admits the fact that there is a lode in the Ashland fissure, substantially as pleaded in the answer of the Ivanhoe Company, and as above set forth.

Second—That this lode crosses the Grizzly claim by passing through its side lines, and is one of its secondary veins or lodes.

Third—That the discovery or primary lode on which the Grizzly discovery and location was made, also cross the Grizzly claim by passing through its side lines, and its side lines thus have become its end lines.

Fourth—That in virtue of the fact that the Ashland lode crosses the side end lines of the Grizzly claim, the respondent has the extra-lateral right covering the ore body in dispute, over the owners of the Ashland claim.

This is in effect to admit the verity and validity of the pleading of the Ivanhoe Company in respect of the existence, the strike and dip of the Ashland lode, and therefore leaves nothing to be decided except the question of which party has the right of lateral pursuit on the Ashland cross-fissure and lode.

The course and strike of the Ashland fissure within the exterior surface boundaries of the Ashland claim is set forth on petitioners' map, Exhibit 20. This fissure is mineralized throughout its extent in Ashland ground, both in the quartzite and limestone, but it is narrow in the quartzite, and wide in the limestone. For the purpose of proving the strike and continuity of the fissure through the quartzite, the earth was stripped from the top of the fissure, and it was thus observed and examined and identified by witnesses, as passing through the southwesterly end line of the claim and continuing northerly through the so-called Jordan limestone, through the overlying quartzite to and over the top of Jordan Hill, where the stripping ended and the fissure extended into the limestone belt north of Jordan Hill, which is called in the testimony the "commercial limestone." From the southwesterly

end line to the end of the surface tracing in the commercial limestone is about 800 feet. (Testimony of Morehouse, page 181.) The testimony of Morehouse on this subject is very explicit, and commencing on page 173 of printed records, is as follows:

"Q. Now, confining yourself to the Ashland claim first, what, if anything, did you observe on the Ashland claim in the way of a fissure, and what was its direction, and what was its extent in length and width? A. I observed the fissure shown from the southwesterly end line by underground workings and strippings, from there up the hill upon the surface, the strike of which was northerly, east of north magnetic a little, for a distance of probably eight or nine hundred feet."

After testifying to the appearance of the fissure underground in the upper and lower Ashland tunnels on the petitioners' Exhibit 21, the witness testified to the fissure at the surface as shown on petitioners' Exhibit 20, commencing on page 178, he said:

"Q. Well, now, coming to this map, did you examine the surface after examining the underground workings? A. Yes, sir.

"Q. What examination did you make, where did you commence, and what did you find, what did you do and what did you see? A. I saw a tunnel driven northerly from a point 115 or 120 feet from station 905. My recollection is that the tunnel was about 150 feet in length. It might have been longer, driven on the fissure; the fissure showing in the roof stoped upward. The face of the tunnel showed the fissure, but at the end of the tunnel it inclined downward a little. Going up it was filled with loose, broken material at the end; the fissure showed in the end of the tunnel and under the roof in places where it had been stoped so high that you could not see the roof. Now I come from the mouth of that tunnel. There is above the mouth of that tunnel, up on the hill here, about 70 feet northerly from the mouth of the old tunnel, a shaft, caved in, but the excavation is large, and down to the filled bottom of it it is probably 12 or 15 feet from the surface, and the fissure shows crossing the shaft, shows on the southerly side, and on the northerly side of the shaft, and about on the east side it goes out to the foot of the shaft, and shows under the easterly wall of the shaft where the shaft is not broken down too far back, and from there on the surface it is stripped. * * *

"Q. Now, proceeding from the shaft northerly, what did you observe? A. There is a trench stripped along from the shaft northerly to station 907, a trench probably about a foot in width and anywhere from one to three feet in depth, maybe four or five feet in places, showing a fissure, the same fissure in quartzite, and there is an ore streak showing all the way along in the fissure from station 907. At station 907 there is a similar excavation, apparently an old one, a small one. Then the stripping goes on. There is no stripping there, but the vein shows through from 907. The stripping from 907 to about 20 feet northerly of station 909. From station 909 there is no stripping, but there are excavations marked 'large excavations,' and another excavation between, and at the end of the stripping several little openings showing a fissure. There is a tunnel, about 60 feet or maybe 75 feet over to station 910—might be a hundred. I did not measure it.

"Q. What did you see? A. There is a tunnel in there, and there is a big cut at the surface, showing the same fissure structure. The tunnel goes in southerly and then ~~turns~~ to the southwest. ~~There~~ about 60 to 70 feet there is a fissure running northerly and southerly.

"Q. This fissure that you have described is running northerly from the old shaft? A. Yes, sir.

"Q. Have you examined that? A. Yes.

"Q. Is that recent work? A. Yes, sir.

"Q. I will ask you whether ore is exposed along that stripping or cut? A. Yes, sir.

"Q. All the way? A. Yes, sir, all the way.

"Q. Anybody can see it? A. Yes, sir.

"Q. Where the stripping ceases, what are the appearances then as to the vein, on the surface? A. After the stripping finishes—the stripping disappears and it is stripped over into the limestone a little ways, the upper lime lying above this quartzite that I have described. At the beginning the stripping being in ore along to station 906; and over at the line of these excavations, is nearly the line of contact of the upper quartzite and upper limestone.

"Q. Where is this upper quartzite that you speak of? Whereabouts with reference to the top of Jordan Hill? A. It is on the top of Jordan Hill, and extends down on the southerly slope.

"Q. How as to the northerly slope? A. Southerly and northerly both; pitches down on the northerly slope and the beds come on the southerly slope; you ~~just~~ encounter them going up.

"Q. I will ask you to state as to the visibility of the fissure as it goes up through the quartzite; if it is visible as it goes

through the quartzite? A. It is visible, but it is much smaller than in the limestone.

"Q. That is, at the top of the Jordan Hill? A. Yes.

"Q. Now, what was there on the other side of the quartzite? A. On the northerly slope, over the summit of Jordan Hill, a limestone body occurs. The stripping extends over into the limestone a little ways.

"Q. On the northerly side? A. Yes, sir.

"Q. I will ask you to look at that picture and see if that is a fairly good photograph of Jordan Hill and of that locality? A. Yes, sir, it is. That is a picture of a portion of Jordan Hill.

"Q. The portion that you are testifying about? A. The portion that I am now describing.

"Q. Which side of the mountain does that represent? A. That represents the southerly side.

"Q. Now, the quartzite you have mentioned is on the top? A. It is on the top of the hill; it shows very prominent on the top of the hill, and the bed of the quartzite extends downward to near the mouth of the Ashland tunnel.

"Q. Now you have gone over the top of the hill? A. Yes, sir.

"Q. And there you found, you say, the lime? A. Lime.

"Q. And what is the visibility, if any, of the fissure on the north side of the hill? A. On the north side of the hill the fissure appearance is very wide; all of these marked 'large excavations' shows fissure structure as well as the mouth of the tunnel and works underground in that tunnel southeasterly from stake 910, in the large excavation and other cuts here showed fissure structure, showing it to be very wide in that belt of limestone.

"Q. I will ask you if you know what is the relative width of the fissure in the quartzite and the limestone there, whether it is wider in the one than in the other? A. Much wider; from only a foot, and in some places only a few inches in the quartzite, it widens out in the limestone so, as I have said, that it is in all probability in evidence for a hundred feet in width. * * *

"Q. What is the distance from the southwesterly end line of the Ashland claim to the end of the surface tracing that you made? A. I think I know what it is, but to be sure I will measure it.

"Q. I want it just approximately. A. Well, about 800 feet.

"Q. When you speak of ore in these old workings, you mean at the surface? A. Yes, sir."

"Q. It appears at the surface? A. Yes, sir."

Testimony of Morehouse, Record, pages 178, 179-180-181.

The testimony of Morehouse is supplemented by the testimony of Hannahs, Record, pages 259, 260.

Testimony of William R. Smith, Record, pages 246-247.

The fact is developed by this testimony that the Ashland fissure where it reaches a point in the commercial limestone, which is marked "large excavation" on petitioners' Exhibit 20, widens out to a breadth of 100 feet.

Morehouse, Record, page 181.

The easterly part of such width remains still in Ashland exterior surface boundaries, and the westerly part extends over the line into Grizzly ground.

14. CONCLUSION ON ARGUMENT CONCERNING LODES.

To conclude the argument on the merits, these petitioners respectively affirm and submit to your Honors that from the foregoing considerations, the just conclusion is, that if there be a broad lode as asserted by respondent, the apex of it is covered by the Kempton and Ashland patented claims, throughout the conflict area, between those claims and the Jordan and Gem claims, in such wise, as to secure to the owners of the former claims the right of lateral pursuit, within their proper end line bounding planes, as against the owner of the latter claims; and therefore, the decree of the Circuit Court of March 23, 1903, in favor of the petitioners was right; unless it shall be decided that the alleged prior locations of the Jordan and Mountain Gem claims are effectual to annul and displace the senior Kempton and Ashland patents of February 23 and September 27, 1875.

The same result must follow if the lime belt is not a broad lode and in any event since it is admitted that the ore channel or vein apexes in Kempton and Ashland ground, and within the conflict areas patented to those claims and upon the Ashland and Kempton veins, for these veins have been mined and traced continuously on its dip to the lowest levels of the Kempton and Ashland mines.

Therefore, it seems to follow, that your Honors will determine that the decree of May 10, 1905, which the Circuit Court of Appeals directed to be entered in favor of the respondent, will be reversed and set aside, and the decree of the Circuit Court of March 23, 1903, in favor of petitioners affirmed.

15. BILL FATALLY DEFECTIVE BECAUSE ON ITS FACE AN EJECTMENT BILL.

All questions upon the merits apart, this action ought to be dismissed for want of equity. The bill alleges that respondent has the legal title and is in possession of the ore in controversy. The bill was drafted for the purpose of obviating a demurrer for want of equity, and to render it immune to the objection that it is an ejectment bill, and thus evade a trial by jury. The purpose was manifest, from the omission to allege, that the legal title to the premises had been previously established at law.

Failure to allege that the title of complainant has been established by at least one trial and verdict at law, is a prime test and proof, that it is an ejectment bill. It is in all cases indeed, an infallible test, unless the bill allege and show that there is some impediment to an action at law being brought to settle the legal title. Therefore, this court has decided that, "in order for a party in possession, to maintain a bill of peace, for the purpose of quieting his title to land against a single adverse claimant ineffectually seeking to establish a legal title, by repeated actions of ejectment, it is necessary for the bill to aver that complainant's title has been established at law; and where it appears from the bill, that an action at law involving the same questions has been commenced but has not been tried, it is a fatal defect."

> Boston, etc., Mining Co. vs. Montana Ore Co., 188 U. S., 632-641.

Counsel for respondent, in their brief on the petition for certiorari affirm that the foregoing is but a dictum, but the fact is that it was one of the matters decided; however, if it was a

dictum in that case, it is nevertheless the law, as appears by numerous authorities, and there is none to the contrary.

Daniell's Chan. Pl. Perkins, 3rd. Am. Ed., volume 1, page 573.

Pomeroy Eq., sections 177, 248, 253.

Adams Eq., 331.

Bainbridge on Mines, 505.

In mining cases where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, and the legal title is in dispute, the modern practice is to require an action at law to be brought to try the legal title, and then to allow an ancillary action on the equity side of the court, in aid of the action at law, and for an injunction to preserve the property, pending the legal proceedings for the determination of the title.

Earhart vs. Boaro, 113 U. S., 537, 538.

Stevens vs. Williams, 5 Morrison's Min. Rep., 449-453.

Morrison's Ming. Rights, 12th Ed., pages 334-335.

The motion which petitioners made at the trial in the Circuit Court, was designed to bring the case within the doctrine and rule of Earhardt vs. Boaro. The motion was in the alternative, to dismiss the bill, or retaining it, to require the respondent to commence an action at law to determine the disputed legal title and right to the possession of the ores, and the segment of lode in controversy. This rule is so just in itself, and so easy of application, that not even the argument *ab inconvenienti* can be urged against it. By observing it the rights of all parties can be protected, and the right of trial by jury be preserved. This court has said more than once, that this is a matter of substance and not of form, and has always jealously guarded the right of trial by jury.

Stevens vs. Williams, before cited, is a case like this, and therein the modern practice is laid down with great exactness and clearness as follows:

"It is plain that the jurisdiction to restrain trespasses, like that to restrain nuisances, is not an original jurisdiction of the

court of equity, which enables this court, under the semblance of preventing irreparable injury to a legal estate, to take a jurisdiction of deciding conclusively upon the legal title itself."

Irwin vs. Danielson, 3 Iredell's Eq., 311.

In the case stated in the pleadings there is nothing like a ground of equitable jurisdiction in respect to the title to the estate. All the matters set up affecting that title are of legal cognizance in which the parties have a constitutional right to a trial by jury.

Hipp vs. Babin, 19 How., 271.

Lewis vs. Cocks, 23 Wall., 466.

To draw the question of title into the United States Circuit Court, sitting in equity upon a merely collateral matter, such as the preservation of the property pending the litigation, would be an usurpation of authority. If there were any equitable circumstance affecting the title itself, upon which the jurisdiction in equity of the court could be made to rest, the principle invoked by respondent might apply. But here we can only supplement the law by preserving the property until the controversy shall be tried out at law. It was suggested in argument that a writ prohibitory in terms, and mandatory in effect, like that adopted by Lord Eldon in 10 Vesey., 192, would afford the relief desired, without violating any rule of equity, might be easily framed. As to a method of proceeding by which the court pretends to say one thing, intending another, we doubt the propriety of its adoption. The law, which will not countenance any shift or subterfuge in others, should not resort to any in dealing with suitors. But, not to make too fine a point, it is enough to say that the practice is not of general application in equity, and can not be used to enlarge the jurisdiction. For instance, it would be easy to say in an action of assumpsit that the defendant shall not continue to withhold from the plaintiff his damages, instead of the usual form, that the plaintiff have and recover his damages from the defendant, but no one would contend that the first would be more in the nature of a decree in equity than the second, or that by such verbal quibbling a court of equity could acquire jurisdic-

tion of such an action. Another rule to be observed in this class of cases then, is, that unless there be some special ground for relief in equity, the title to the estate must be settled at law, and a court of equity will not enter into that question.

Regularly the law action should be brought before application is made for an injunction, and that fact should be averred in the bill, but where that has been omitted through mistake or inadvertence, the rule has been so far relaxed as to admit of the bringing of such suit after the filing of the bill, the plaintiff being put upon terms of commencing the suit within a short time and prosecuting it with diligence.

With regard to the nature of the law action, if the premises are held adversely, it should be to recover the possession, as that will most certainly raise the issue of title. But if the injury proceeds from occasional trespass, the wrong-doer not continuing in possession, it may be sufficient to bring what before the recent change of procedure would have been called *quare clausum fregit*. But this form of action should not be used when the facts will support the ejectment, for the equity court will make the settlement of the title at law a condition to its action.

Of course, all that has been said is with reference to cases in which a judgment at law respecting the title has not been obtained. Where the title has been settled the court will not hesitate on a proper showing to protect the legal estate.

Stevens vs. Williams, 5 Morrison's Min. Rep., 449, 452, 453.

16. RIGHT OF TRIAL BY JURY IN SUITS TO QUIET TITLE UNDER SECTION 3511 REVISED STATUTES OF UTAH, 1898.

It is asserted by the respondent's counsel, and so decided by the Circuit Court of Appeals, that section 3511 of the Revised Statutes of Utah of 1898 is applicable in suits to quiet title in the federal courts of that state. That by that statute, the legal title to land may be settled in a suit to quiet title without the intervention of a jury. This is contrary to the interpretation and application of the statute by the Supreme Court of Utah. The point

was directly decided by that court in Park vs. Williamson, where section 3511 was construed thus: "Actions to quiet title, or to determine adverse claims under section 3511, Revised Statutes of 1898, may be of a legal or equitable character, depending upon the pleadings; but where there are both equitable issues, and issues of fact in the case, the court should first determine the equitable issue, and then submit the issues of fact to a jury upon proper instruction, and a failure to do so constitutes reversible error."

Park vs. Williamson, 21 Utah, 279, 285.

This statute, which is thus construed and applied, reads as follows:

"Section 3511. An action may be brought by any person against another who claims an estate or interest in any real property adverse to him, for the purpose of determining such adverse claim."

Rev. Stat. of Utah 1898, section 3511, page 780.

It is a great and injurious mistake, to suppose that this legislation was intended to supersede the right of trial by jury in the determination of purely legal estates, and disputed rights of possession to land. There certainly are no words which express such an intent, and the better interpretations of the statute do not give it that effect. The mistaken interpretation of it, which has been adopted by some courts, seems to have occurred from a misapprehension of the principles on which this court decided the case of Holland vs. Challen, 110 U. S., 15, and by giving to that case a wrong jurisprudential classification. In that case the facts were that the complainant Holland had obtained a title to a certain vacant and unoccupied parcel of land in Nebraska under a judgment and sale thereof for unpaid public taxes. Neither the plaintiff or defendant was in possession of the premises. The plaintiff asserted title in virtue of his tax deed; the defendant asserted title under his regular title deeds existing prior to the tax deed. The plaintiff asked the equitable interposition of the court to remove the claim on his title, by a decree which should declare the tax deed to be good and valid, and that the deeds under which defendant asserted title were a cloud on plaintiff's title, and therefore

invalid. From this statement it is easy to perceive that there were in the case elements or matters of original, or at least concurrent, equity jurisdiction. In this case there is none. In Holland vs. Challen, the jurisdiction of the court to determine even the legal title might well be asserted under that rule of equity jurisprudence, by which, when a court of equity has obtained jurisdiction of a cause for one purpose, under any head of original or concurrent equity jurisdiction, it may retain it for all purposes in the case, even to the settlement of purely legal titles and estates, and the assessment of damages, and, in fact, for the determination of all questions, legal or equitable, which may arise in the suit. Moreover, Holland vs. Challen has been limited and explained by the decisions in Whitehead vs. Shattuck, 136 U. S., 146-151, and Scott vs. Neely, 140 U. S., 106-109. In the latter decision it is said:

"The general proposition, as to the enforcement in the federal courts of new equitable rights created by the states, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the states by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the federal courts this right can not be dispensed with, except by the consent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law, of a demand for equitable relief in aid of the legal action as during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact."

Scott vs. Neely, 140 U. S., 109.

It can not be maintained that this bill states a case within either the original or concurrent heads of equity jurisdiction; nor that the statute is an amplification or enlargement of any principle of equity jurisprudence. The only ground of equity jurisdiction asserted by this bill, is the right to an injunction, and that

is no part of the original or concurrent equity jurisdiction of the court, but a part of its auxiliary jurisdiction merely.

"In all cases," says Mr. Pomeroy, "where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or to recover possession, against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines, or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles to land which are wholly legal, and to award the relief of recovery of possession."

Pomeroy's Eq. Jur., section 177, volume 1, page 211.

The decision of the Circuit Court of Appeals denies the applicability of the foregoing principles and doctrines of equity jurisprudence to this case because of the statute, section 3511 before set forth. The argument by which the court reached such conclusion is as follows:

"The elements of federal jurisdiction being present, a right of action created or enlarged by the law of the state, and made enforceable in its courts of general jurisdiction, is equally enforceable in the federal courts sitting in that state; but, notwithstanding the procedure prescribed by the laws of the state, the enforcement in the federal courts can be by suit in equity only where there is not a plain, adequate and complete remedy at law, according to the distinction between actions at law and suits in equity prevailing in those courts.

"The laws of Utah give a right of action in the courts of that state to quiet title to real property without any previous adjudication of the title in an action at law, and without reference to possession. This enlarged right is enforceable by a suit in equity in the federal courts when the complainant is in possession, and the defendant is out of possession, or when both parties are out of possession, because in either case there is no adequate remedy at law."

See Petition for Certiorari, pages 20, 21, 134 Fed. 769.

We respectfully ask the court to consider the certain error which is embraced and asserted in the foregoing generalization. As the proposition is thus stated, it affirms the erroneous postulate, that the statute enlarges the equity jurisdiction of the court in such wise, that questions in the case, which but for the statute would be cognizable in a court of law, are by force of the statute withdrawn from its jurisdiction, and are committed for determination to a court of equity. Such is not the effect or intent of the statute, and as we have seen such is not the application given it by the Supreme Court of Utah. The statute does enlarge the remedy in suits to quiet title in the courts of the state, in so far, as it is not now necessary, as before the statute, that the legal title and right to possession of plaintiff shall have been previously established at law. But still, it is required, if his legal title and right to possession be disputed, that it shall be determined in the same suit, by appropriate pleadings and proceedings on the law side of the court, including a trial by jury, unless a jury be waived. In a state court all this may be done in the same suit, because legal and equitable remedies may be administered under these so-called Reformed Codes of Procedure in the same proceedings, where in the federal courts separate suits are required.

The eminent jurist who wrote the opinion of this court in Holland vs. Challan, in Whitehead vs. Shattuck, and Scott vs. Neely, when chief justice of the Supreme Court of California, gave a comprehensive interpretation and application of the statute, in the case of Curtis vs. Sutter, 15 Cal., 262. At the time of that decision, which was made in 1860, the statute was substantially as it is now, except that it required that the plaintiff should be in possession. The exact words of the statute were as follows:

"An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

See California Practice Act of 1851, section 254.

This statute was construed and applied thus:

"Under the statute of this state it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted. It does not follow, from the fact that the suit is brought in equity, that the determination of questions purely of a legal character in relation to title will necessarily be withdrawn from the cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may be proper, an issue to be framed upon the pleadings and submitted to a jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill or adjudging the adverse estate or interest claimed to be invalid and of no effect, and awarding a perpetual injunction against its assertion to the property in question."

Curtis vs. Sutter, 15 Cal., 260, 263.

The courts of Utah and California now follow the decision in Curtis vs. Sutter, so that whenever in a suit to quiet title to land, the legal title is disputed, and becomes an issue, the court will require that question to be tried by a jury, by appropriate pleadings and proceedings in that suit, as in a trial at law.

Section 738 of the California Code of Civil Procedure is in the exact language of section 3511 of the Revised Statutes of Utah of 1898, and is as follows:

"Section 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Section 738, Code of Civil Procedure.

In construing and applying this legislation the Supreme Court of California says, at page 124:

"It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, can not encroach upon that provision of the state Constitution which says that 'the right to trial by jury shall be secured to all, and *remain* inviolate.'"

"And section 738 of the Code must not be construed as intending to violate that provision of the Constitution, unless such construction be unavoidable."

"Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the Constitution was adopted, and therefore either party had the right to have such issues tried by a jury. (Tabor vs. Cook, 15 Mich., 322.) And section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if in such a suit issues arise which are clearly legal and cognizable in a court of law the Code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not be maintained at all; plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an action. The Code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right under the Constitution to have them tried."

Donahue vs. Meister, 88 Cal., 121-124.

Newman vs. Duane, 89 Cal., 597, 598.

The statute of Utah was enacted by its legislature with this interpretation upon it by the Supreme Court of California.

No decree to quiet title, and no injunction against the assertion by defendant of an adverse estate or title, can ever be entered in any case, until the dispute as to whether the plaintiff or defendant has the legal title is determined.

"Those only who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace, or to dissipate a cloud on title."

Orton vs. Smith, 18 How., 265.

17. THIS IS NOMINALLY A SUIT IN EQUITY, BUT ACTUALLY AN ACTION AT COMMON LAW, IN MEANING OF SEVENTH AMENDMENT TO CONSTITUTION.

A suit to determine the legal title to land is a suit at common law and not in equity according to the Seventh Amendment to the Constitution of the United States, for it is said:

"By common law they (the framers of the amendment) meant what the Constitution denominated in the third article 'law' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered."

Parsons vs. Bedford, 3 Pet., 433, 446, 447.

Penn vs. Holme, 21 How., 481.

Root vs. Railway Co., 105 U. S., page 207.

18. ALL OTHER QUESTIONS APART, IT IS DUTY OF COURT TO DISMISS BILL *SUA SPONTE* AGREEABLY TO RULE ESTABLISHED BY THIS COURT IN HIPP VS. BABIN, PARKER VS. WINNEPISEOGEE, LEWIS VS. COCKS, AND OTHER DECISIONS OF THIS COURT.

PLEADINGS AND EVIDENCE WHICH SHOW THAT THE PETITIONERS WERE IN ACTUAL POSSESSION AND IMMEDIATE OCCUPATION OF DISPUTED PART OF LODE AT TIME OF THE FILING OF THE BILL.

All other questions apart, the court below ought to have dismissed this bill sua sponte, according to the rule established by this court in numerous decisions.

Hipp vs. Babin, 19 How., 271, 278.

Parker vs. Winnipiseogee, 2 Black (U. S.), 545, 550.

Lewis vs. Cocks, 23 Wall., 466, 470.

Killian vs. Ebbinghaus, 110 U. S., 568, 573.

Grand Chute vs. Winegar, 15 Wall., 375.
Allen vs. Pullman Car Co., 139 U. S., 658, 662.

Not alone do the pleadings in the case show that this is a dispute concerning the legal title only, but the evidence adduced by the respondent in its case in chief proved, without more, that the petitioners were in the actual possession and immediate occupation of the segment of the lode in controversy. It was on that evidence, as well as the pleadings, that the petitioners moved the court to dismiss the bill at the close of the testimony adduced by the respondent in its case in chief. The possession of petitioners was shown by the testimony of the witnesses J. Fewson Smith and Holden, as follows, at page 83.

"SMITH'S TESTIMONY.

"Q. Mr. Smith, you have been underground in these various claims you have described, that is the Northern Light, Jordan Extension, the Grizzly, and the workings so far as they are within the boundaries of these claims? A. Yes, sir.

"Q. The map you have been referring to heretofore in your testimony is Exhibit 'Q'? A. Yes, sir, I think so.

"Q. Now, I call your attention to a map which will be marked Exhibit 'R,' showing the same underground workings on these claims. Do you know where through these workings any ore bodies are disclosed underneath this Northern Light? A. I know where the so-called ore bodies are disclosed.

"Q. Show where they are on the map. A. In the west of the Northern Light mine, as I have it laid down here, between the green line S and extending southerly to the green line U. Some of them are to the west of that line ¼ of the Northern Light, lot 53, and to the south of the green line marked S and to the north of the green marked U.

"Q. And shown by what if any levels there? A. Shown, well, on the purple, the orange, the brick red, and also on the blue.

"Q. Now, are any ore bodies shown under the Jordan? A. Yes, the so-called upper and lower stope.

"Q. Anything under the Grizzly, or would those be under the Grizzly? A. Well, the first described ore bodies, so-called ore bodies, would lie beneath the ground in conflict between the Grizzly and Northern Light; yes, sir.

"Q. And would they extend into the Northern Light beyond the side line of the Grizzly here? A. Yes, they would, although I have limited the position by the letter U.

"Q. Now, in the Fairview workings, you haven't reached there any ore bodies disclosed underneath the Fairview? A. There is ore there, but as to the body I can not say; there is ore in the face.

"Q. There is ore in the face of the drift; of the drift which extends from the side line of the Fairview in the purple drift? A. Yes, sir.

"Q. How do you describe the lower stope, in connection with the stope here? They show ore bodies underneath Jordan Extension extended vertically down? A. Yes, sir; Jordan Extension.

"CROSS-EXAMINATION.

"Q. What works are represented on those maps? A. Whose workings?

"Q. Whose workings are represented on that map; whose underground workings? A. They are the workings that had been done by orders of somebody not in the employ of the United States Mining Company.

"Q. Well, the work that you have testified to has been done there, not by the United States Mining Company? A. Yes, sir.

"Q. Do you know who the parties were who were in possession? A. I know the parties doing the work, doing it under the direction of Colonel Wall.

"Q. When did you first go in there to see them? A. I can not say that; at different times between now and 1899. I will state recently the works—I know that the work has been done by Colonel Wall. At an earlier date it may have been done under the direction of a man by the name of Sampson.

"Q. But for the year last past, do you know Col. Wall has been there working in Northern Light ground? A. Yes, sir.

"Q. And many of these works are old workings? A. Yes, sir.

"Q. They were there when you first took employment with the predecessors in title of the United States Mining Company? A. Some of them.

"Q. And were beyond the northerly side line of the Kempton ground? A. Yes, sir." (Record, pages 83-85.)

Testimony of Holden is as follows:

"Q. Are you familiar with the ore bodies underneath the surface of the Northern Light, as shown upon Exhibit R? A. I am.

"Q. And underneath the surface of Jordan Extension Lot 423? A. I am.

"Q. And whatever there may be under Fairview? A. There are ore bodies underneath Fairview, but not shown on that map.

"Q. And underneath Grizzly? A. Yes, sir.

"Q. Who, if anybody, has been working upon those ore bodies within the last year? A. The ore bodies on this map, shown from the purple level up to the green level, have been worked; a portion of those workings have been run by Col. Wall and his associates.

"Q. During the last year? A. During the last year.

"Q. And what have they done in the way of extracting ore? A. They were extracting ore and shipping it.

"Q. In what quantities? A. In considerable quantities; I think there is about a thousand tons all told, probably.

"Q. A large quantity? A. Yes.

"Q. That they took out and shipped? A. Yes, sir.

"Q. Prior to the beginning of this suit? A. Prior to the beginning of this suit.

"Q. And would that be so with reference to the ore bodies in the Jordan Extension? A. There was some ore taken, not by Col. Wall altogether; he took some, and there were other leasers of the Kempton property took other ores.

"Q. And would that be so also with reference to the ore bodies that extend beyond the south side line of the Grizzly into the Northern Light? A. Yes, sir. I am not sure that there has been any ore, or very little ore taken. I think most of the work is old work.

"Q. There appears to be an upraise here; is that in ore? A. There is ore there.

"Q. Leading from the green level into this triangular piece of Northern Light? A. Yes, sir.

"Q. There is ore there? A. There is.

"Q. Do you know whether or not, at the time this suit was brought, they were working those ore bodies, taking ore out? A. They were.

"CROSS-EXAMINATION.

"By Mr. Hiles.

"Q. These workings are all Kempton workings, that are projected on that map, are existing underground workings? A. Made by the Kempton people, or owned by them?

"Q. Yes, and they extend from the surface of the earth down to the lowest level, do they not? A. Yes; there are sections between the surface and the lowest level." (Record, pages 96 and 97.)

Thus did the evidence on the part of respondent, in its case in chief, prove that the "Kempton people" when this suit was brought, were working in mines or workings "owned by them" and which extended from the surface to the lowest level. The testimony shows conclusively that the Kempton workings at the surface are inside the Kempton exterior surface boundaries, and on the apex of the lode. Such a possession is an actual and not a constructive possession of the lode throughout its entire depth, on its dip, beyond the northerly side line of the Kempton claim, under adjacent surface ground.

This evidence, in itself, is sufficient to warrant the court in dismissing the bill. It proves that when the respondent filed this bill that it was not in the possesion of the disputed premises, and that its allegation of possession in itself, was not true.

Whoever is in possession of the apex of a lode, or of any part of it, is in the *actual* possession of every extra-lateral part of the lode, which possession of the apex legally secures.

Montana Min. Co. vs. St. Louis M. & M. Co., 102 Fed., 430.

Therefore, notwithstanding the respondent alleged in its bill that it was in possession, when the answer of the defendant came in, which made the issue of legal title and right to possession of the lode under a patented title thereto, and the evidence proved an actual possession and immediate occupation by defendants of the lode in dispute, at its apex in Kempton and Ashland ground, and on its dip under adjacent surface ground, it certainly became the duty of the court under the repeated decisions of this court, to dismiss the bill *sua sponte*, apart from all other questions in the case.

Respectfully submitted,

OGDEN HILES,
CHARLES C. DEY AND
CHARLES J. HUGHES, JR.,
Solicitors for Petitioners.

MAPS

TOO

LARGE

FOR

FILMING

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 24.

LEONIDAS M. LAWSON, WILLIAM J. HARVEY, EDWARD BALBACH, JR., ENOS A. WALL, HEBER M. WELLS, THOMAS KEARNS, JUNIUS F. WELLS, AND THE IVANHOE MINING COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES MINING COMPANY, A CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF OF PETITIONERS.

I.

HOW THIS CASE IS HERE AND UPON WHAT QUESTIONS OF LAW AND FACT.

In view of some interrogatories addressed by members of the court to counsel for petitioners during the oral discussion, and of the nature of the questions which are presented in the briefs and at

the oral argument, we call attention to the fact that this case is before this court upon a writ of certiorari to the Circuit Court of Appeals, and that by section 6 of the Judiciary Act of 1891 it is provided: "That in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." So that any and all questions of law and fact involved in the case and necessary for its determination or review, and which might have been considered had the case been brought here upon appeal, are now open for investigation and determination by this court.

Panama Railroad Co. vs. Napier Shipping Co., 166 U. S., 280.
Ridings vs. Johnson, 128 U. S., 218.

Among the questions of law which are thus now before this court for consideration are many important ones affecting extensive interests and the general administration of justice with reference to mining claims, about which there is much controversy and conflict of decision, and some of which have not yet been determined by this court.

II.

ANALYSIS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS, ITS FINDINGS OF LAW AND FACT, THE ATTITUDE OF RESPONDENT WITH REFERENCE THERETO AND AS TO THE NATURE OF THE SUIT AND THE GROUNDS UPON WHICH IT BASED AND NOW BASES ITS EFFORT TO QUIET TITLE, AND THE RESULT, WITH REFERENCE TO THE QUESTIONS NOW BFORE THIS COURT.

Counsel for respondent have filed two briefs in this case, one on April 23, 1906, which, for convenience in this discussion we shall call the "April brief," and another on October 10, 1906, which, for like reasons, we shall call their "October brief."

The Circuit Court of Appeals unquestionably reversed the decree of the Circuit Court and ordered the cause to be remanded to that court with directions to enter a decree in accordance with the prayer of the bill of complaint (134 Fed. Rep., pp. 769-777), upon the theory that the respondent claimed ownership to and in this suit sought to have its title quieted as to the ores beneath the surface of the Northern Light, Jordan Extension, Grizzly and Fairview claims, upon the contention that these ore bodies were in and a portion of a lode consisting of what has been called in the evidence the Jordan limestone, v. th its alleged apex as to these ore bodies within the Jordan and Mountain Gem claims owned by the respondent, and that the title to these ore bodies was in the respondent by virtue of its ownership of the Jordan and Mountain Gem claims. The Circuit Court of Appeals considered, tried and made findings of law and fact, ordered the reversal of Judge Riner's decree and the entry of the decree prayed for by respondent, only upon this theory. This appears from the opinion, and was, in the opinion of petitioners, the thing done by that court, as pointed out in petitioners' original brief (p. 4), and this in effect is expressly stated in respondent's October brief (page 186). This, however, was not, respondent says, its claim or the suit it presented and tried.

At page 183 of the October brief, it is said:

"Respondent is insisting only upon its intralimital rights as to this claim (Grizzly), as well as to the other three of its four claims."

And at page 25:

"Respondent does not by its bill, or its evidence in support thereof, rest its right to have its title to the ore bodies lying beneath the surface of the Northern Light, Jordan Extension, Grizzly and Fairview Mining claims, quieted as against petitioners' asserted interest or claim of ownership therein, upon any claim of extra-lateral rights attaching to either the Jordan or Mountain Gem Mining claims.

"On the contrary, its claim for relief is based *solely* upon the fact that it is the owner of and in possession, of said four claims, and is therefore, presumptively the owner of, and in possession of, all the ore bodies lying beneath the surface of the same."

Respondent, in its October brief (pp. 22, 28, 26, 27, and in the oral argument) asserts and reasserts in effect that the cause deter-

mined by the Circuit Court of Appeals, is not the cause set up in its suit; that the findings of the Circuit Court of Appeals are not and can not be the basis of a decree quieting the title to the ores in question in this suit; that the suit it brought and the evidence it introduced, theory it advanced and the claims it made, were not to secure a quieting of the title to the ores in dispute by virtue of the ownership of the Jordan and Mountain Gem claims, the existence of an apex therein, nor because said ores were owned by virtue of the ownership of such apex, but that on the contrary the suit brought and tried, the claim made during the pendency of the action and now made, is that the court should quiet the title to the ore bodies in question in the respondent, only and solely, as being parts of the four claims mentioned, and as being owned by respondents as the owner of said claims.

Counsel for respondent, at the recent oral argument, upon this subject said:

"In the bill it is alleged that the complainant, the United States Mining Company, is the owner of the Jordan Extension mining claim, to which I now point, and that it is the owner of the Northern Light mining claim, and also the owner of the Grizzly mining claim and of the Fairview mining claim, and in possession of each of those claims; that beneath the surface of each of those claims is found a lode and vein of rock in place, bearing gold, silver, etc.; that the defendants, the owners of the Kempton, assert an adverse estate or interest in the ore bodies underlying these claims of the complainant, and that in pursuance of their assertion of adverse interest therein they had, prior to the commencement of the action, entered beneath the surface of some of these claims and commenced the extraction of ore, and the complainant prays to have its title quieted as against the unfounded, as alleged, and unlawful, assertion of title in and on the part of the defendants.

* * * * * * * * *

"That we were not claiming extra-lateral rights is manifest from the reading. That we were not claiming these ore bodies which underlie the Jordan Extension, Northern Light and Grizzly by virtue of extra-lateral rights attaching to the Jordan, lot 64, or the Mountain Gem mining claim, is manifest, I say, from a reading of the bill itself. * * * Why, if we had been claiming extra-lateral rights, if we had been claiming these ore bodies by virtue of extra-lateral rights attaching to the Jordan, lot 64, or the Mountain Gem, or both of them, our bill stated no cause whatever. Why? Because in the charging part of the bill all that is said, apart from what I have said, that this vein, having its apex in the Jordan, lot 64, and in the Mountain Gem,

on its course downward passes the northerly side lines of the Kempton mining claim, and extends beneath—what? Beneath the Jordan Extension; that is all. Not that it goes on beneath the Fairview, the Grizzly or the Northern Light. It is manifest that nobody could be misled by it. It is manifest that our asserted right to have our title quieted was based upon ownership of the surface of the claims beneath which these ore bodies in controversy are found; and being the owners of it, and in possession of the surface of these claims, as has been repeatedly determined (and I need not stop to refer to authorities upon it), we are presumptively the owners of everything within the boundaries of those several claims, extending downward vertically.

* * * * * * * * *

"This brings me to our case in chief, showing that what we understood was the ground upon which we based our right to have our title to these ore bodies quieted was as I have stated, and that our friends upon the other side who took part in the trial understood it in the same way."

Therefore the Circuit Court of Appeals tried and made its finding which controlled its determination on and decided a case which was not relied upon by the respondent, and gave the respondent a decree upon a title and theory and cause which respondent maintains was not set up in this suit. The respondent occupies the attitude of seeking to escape from the inevitable defeat which it manifestly apprehends must come to it in this court if it relies for success upon the theory and decision of the Circuit Court of Appeals, by disclaiming that decision as the basis for its decree, but clings to the result, and asserts that the decree of the Circuit Court of Appeals is right, although it was made as the result of the trial of a suit not brought, upon a title not asserted by the respondent and not relied upon by it for that purpose. The singular situation is presented of a decree rendered by Judge Riner in the Circuit Court being reversed and a decree directed to be entered by the Circuit Court of Appeals in accordance with the prayer of the bill, as the result of the trial by the Circuit Court of Appeals of a supposed suit which has not yet been instituted, and as the result of finding the respondent to be the owner of the ore bodies in question under a title which it does not in this case assert, and of its being awarded this ownership upon a theory which it expressly repudiates.

In substance the respondent now declares that the Circuit Court of Appeals ascertained some facts and reached some conclusions which it thinks are in themselves sound, but in basing a decree upon them went far afield from the cause of action it had presented for con-

sideration, found it to be the owner of a title it did not assert, and gave it a decree to which it had no right in this suit, upon the grounds upon which the Circuit Court of Appeals awarded it; and further, announces that these findings are not sufficient to maintain the decree based upon them, and that the decree must be sustained on other titles, facts and grounds, upon the ownership of other claims. The petitioners are here questioning the correctness of a result based upon findings of fact which they assert are not justified, upon legal conclusions therefrom which they maintain are unwarranted, and the respondent concedes that it has no right to and does not claim any right to the decree upon the theory upon which the Circuit Court of Appeals awarded it. This is in logical effect a confession by respondent of error by the Circuit Court of Appeals in the decree which it directed, for a decree must be supported by and be in conformity with the findings of fact and law, upon which it is founded. Ought not the respondent to say frankly, you need not proceed further in discussion of your claim that the decree in this case entered by the Circuit Court of Appeals is without warrant in the findings of that court. Then, if not ready to confess the error, and desires and claims the right to do in this court that which it asserts it did in the Circuit Court and Circuit Court of Appeals, endeavor to secure a decree upon the suit which it says it really brought and upon the theory which it claims to have consistently asserted and maintained, so say to the petitioners and to this court, and then, if it may under this anomalous condition in this court, to which petitioners have been compelled to bring this cause for the review of an opinion confessedly insufficient to maintain the decree, urge that it may now support that decree upon other grounds, upon the assertion of another title and in fact upon a suit other than that which the Circuit Court of Appeals considered and passed upon, and assume the burden which rests upon it in attacking a decree fortified by all the presumptions which properly and universally attach to decrees such as was rendered in the Circuit Court.

Upon the October brief and the oral argument, which of course bind respondent, for the purpose of ascertaining what is before this court for consideration, we might properly disregard the findings of the Circuit Court of Appeals as to the ownership of the ore bodies in question and the basis upon which it renders its decree, for it should be a needless task to discuss a finding which is conceded to be insuffi-

cient to support the decree. Must it not also be taken as confessed that the Circuit Court of Appeals therefore erred in trying a suit which was not before it and in basing a decree upon a title which was not presented for that purpose, and in quieting the alleged ownership of the respondent to ore upon a title which was not asserted, while ignoring and failing to ascertain the existence of another title which was claimed to be the basis and the only basis of that right? Respondent states and re-states, in the October brief, its claim, theory, title and suit, and the only grounds upon which it asserts its right to have a decree against the petitioners or to secure a reversal or modification of the decree entered by Judge Riner; which are that it claimed title to the ore in controversy only because of its ownership of the four claims beneath whose surfaces the ore was alleged to exist, and this upon the theory that the ore was beneath the surface of these claims and therefore, presumptively, at least, belonged to the owners of these mining claims as parts thereof, and that the petitioners had not proved apex rights thereto.

Since there has been developed to the petitioners, as a result of an examination of respondent's October brief and a consideration of the oral argument herein, respondent's attitude toward the Circuit Court of Appeal's decision, it has been unable to find a case paralleling the one here presented, but they suggest that the result and the situation in this court, in a cause won by the petitioners in the Circuit Court, reversed and decree for respondent ordered in the Circuit Court of Appeals, upon a cause, upon law and facts, theory and findings which the respondent itself declares do not support it, but which petitioners being unable otherwise to review, has brought to this court for consideration upon *certiorari*, is anomalous. The case necessarily stands in this court, as to findings, presumptions and the relations of the litigants, as though the respondent was here upon an appeal from the Circuit Court with adverse findings and decree against it, as to the facts and theories upon which its suit was and should have been tried, and now has only the right, if it has that right, to secure from this court a reversal of the Circuit Court, not upon the decision by the Circuit Court of Appeals, but upon a case which the respondent claims to have pleaded, to have tried, to have relied upon, and which it must now show it sustained.

There are precedents, and some in this court, to the effect that a decree by a trial court may be sustained by right reasons when the

trial court has assigned wrong reasons therefor, and that other grounds for reversing a decree may be urged in the Appellate Court than those below presented in opposition to the rendition of the decree, we are unaware of any authorities which permit the respondent to a writ of *certiorari* from this court to the Circuit Court of Appeals, to urge upon this court grounds for reversing the Circuit Court which were not passed upon by the Circuit Court of Appeals in a cause in which the Circuit Court of Appeals had reversed the Circuit Court upon admittedly irrelevant grounds and theories.

Not conceding now or at all the right of the respondent in this cause to endeavor to secure from this court a reversal upon grounds which were not acted upon by the Circuit Court of Appeals, but conceding for the purposes of this argument, that such contention may be made, the effect is that there never has been a reversal in fact of the suit tried; that Judge Riner's decree is and should be considered as unreversed, and that the proper results to be reached and action to be taken in and by this court should be investigated and ascertained upon that theory. Assuredly it can not now be claimed that there is any burden upon the petitioners to show why the Circuit Court of Appeals' decision and decree should be reversed, or since this court in *certiorari* deals directly with the decree of the Circuit Court, the decree of Judge Riner should be restored and affirmed from the standpoint and upon the contentions of respondent. Upon this theory the respondent must establish and maintain error in the decree upon its suit and the case it claims to have tried, and combat the findings and presumptions made in and attached to the decree for the petitioners upon that case by the Circuit Court. It would seem that as a matter of legal necessity and of justice in the premises, applied to the admitted situation, the decree of the Circuit Court must be affirmed, since this court does not send a case brought to it upon *certiorari* back to the Circuit Court of Appeals for the purpose of considering matters which it has not considered. That the Circuit Court of Appeals took the same view of this case which, when presented to this court respondent pronounces a radical misconception of the entire proceeding, of the pleadings and order of trial, warrants the claim that respondent ought to take nothing and to have no advantage by virtue of this unwarranted action.

When we penetrate to the very substance of the situation, in the light of the October brief, the Circuit Court of Appeals never con-

sidered or passed upon the cause tried below, the cause appealed or the ground upon which it was asserted by the respondent it had a right to a reversal. It did not determine the questions which control the case respondent says is the only case pending.

Respondent must adhere to the position and theory now presented, and may not ask, under any circumstances, that this Court shall utilize the result of the consideration by the Circuit Court of Appeals of a misconceived case, to secure a decree for the respondent or to annul the decree for the petitioners. It has burned its bridges behind it as to sustaining the Circuit Court of Appeals upon the grounds which that court adopted as the basis of its action.

Petitioners, in the oral argument, contended that the respondent had in its October brief abandoned the Circuit Court of Appeals' decision as untenable, and had likewise faced about with reference to the suit it had tried and urged in the court below. We defer for later discussion the correctness of our claim that the suit which respondent had brought and the claim which it had made was that upon which the Circuit Court of Appeals had found in its favor, and that when we demonstrated, as we contended we had, that this decision could not stand, petitioners had thereby rendered it impossible for that reason for respondent to succeed at all, and now shall discuss the suit, the title, the evidence and the law upon which respondent stands before this court asserting its right to a decree quieting title in it to the ore bodies in dispute.

Whether we were correct or were justified in saying at the oral argument that there had been an abandonment by the respondent of the suit it had brought, and of its claim to a decree by virtue of the ownership of the Jordan and Mountain Gem and an apex within them, or extra-lateral rights held only because of the ownership of those claims, we were thoroughly justified in saying, at the oral argument and in here repeating, that the respondent had abandoned the decision of the Circuit Court of Appeals as to fundamental questions of law and facts upon which that court proceeded.

The Circuit Court of Appeals held that the limestone stratum called the Jordan limestone, was a lode—a broad lode—that the outcrop of this limestone stratum constituting the apex of this lode, was in the Jordan and Mountain Gem claims as to a portion of its width; that the Jordan and Mountain Gem claims were older locations than the Ashland and Kempton claims, and that therefore, since they had a

part, a greater part in width, so the Court held, of that portion of the limestone which covered as an apex the ore bodies in controversy, they took, through their extralateral rights, the entire width of the vein upon its dip; that since respondent owned these claims by virtue of these facts, it was the owner of the ores in controversy, lying beneath the surfaces of the Fairview, Grizzly, Northern Light and Jordan claims, and because of this title to the first two claims was entitled to a reversal of Judge Riner's decree, and to a decree finding that the respondent owned these ore bodies, and to have title thereto quieted against any claim which the petitioners might make against them through ownership of the Ashland and Kempton claims. The Circuit Court of Appeals found, in substance, as the essential part of its adverse determination to the petitioners, that the apex of the ore bodies beneath the four claims in question was not within the boundaries of those claims, but was, as to a part of its width, within the Jordan and Mountain Gem claims, and as to a part in the Kempton and Ashland claims, and that the respondent was the owner of the ore in controversy because—and this was the only basis therefor found—that it owned the Jordan and Mountain Gem claims. Contrast this determination with the claim made now by the respondent upon its right to recovery.

In addition to these affirmative findings, which could only sustain the suit that was not brought, the claim which is not made and which can not, it is now frankly confessed, support the decree of the Circuit Court of Appeals, that Court's opinion in interesting, instructive and important as to the things which it did not find nor hold, and among them are these; it did not hold or find that the ownership of the ores in controversy was in the respondent because beneath the surface of the Grizzly, Northern Light, Fairview and Jordan Extensions; nor that the Kempton vein crossed two side lines of that claim and was therefore without extra lateral-rights, either considering the Kempton bedded vein or the limestone stratum as the lode controlling the situation; nor that the broken lines making up respectively the two side lines of the Kempton claim were separate individual side lines of that claim; nor that upon its dip there was a termination of the Kempton bedded vein, having its apex within the Kempton claim, before it reached the ore in dispute; nor, as to the Ashland claim, does that opinion find or the Circuit Court of Appeals determine that the apex of the Ashland fissure vein crossed from the Ashland surface as

patented into the Grizzly claim, so that the apex or any portion of the ore in controversy was not beneath the Ashland apex within the Ashland claim; nor that the apex of the Ashland vein inside of the boundaries of the Grizzly was the apex of the same ore bodies which are covered by the Ashland apex within the Ashland claim; nor that the Grizzly was older than the Ashland and therefore took this ore within its boundaries beneath its surface by virtue of the existence of prior intralimital apex rights. The law is, as has been often adjudicated by the courts and as is provided by the statutes that the owner of the apex of a lode owns the ore in the lode, and that the ore found in a vein apexing elsewhere, is not the property of the owner of the surface by virtue of such ownership. Any *prima facie* presumption of ownership arising from the ownership of the surface is consequently negatived by the proof or by an allegation in a pleading establishing or asserting, as to the one making that allegation or proof that the existence of the apex outside the boundaries of the claim. The announcement of such existence is an affirmative, inconsistent and destructive proposition to the claim that ownership of the ore exists because of ownership of the surface only. Accepting, for the purpose of this proposition, the present attitude of the respondent as correct, the result with reference to the propriety and rightfulness of maintaining the Circuit Court of Appeals' decree is the same as if through a misconception of the evidence, mislocation of the surface boundaries of the claim, or a misapplication of the law and the facts, it should appear that the apex of the ore bodies in question was neither in the four claims nor in the Jordan and Mountain Gem claims, or if any portion of it was within them, another portion was in other claims of superior validity and priority of location, under the adjudications of the court and the operations of the statutes with reference thereto, and upon either, the decision may not stand. It is equally unsupported whether it was based upon a misconception of what was before it in the way of the suit to be considered, as respondent maintains, or whether it based its determination of those questions upon a misunderstanding of the evidence, and error in the law applicable thereto. Therefore, as the contention is now presented, the petitioners are entitled to a reversal of the Circuit Court of Appeals' decision, and an affirmance of the Circuit Court's decision, without presenting any reasons why the former should be reversed and the latter affirmed beyond the confession that the former is a decision which even the respondent disclaims

as being a sufficient or proper or pertinent determination of the real cause presented or as furnishing reason why the respondent should succeed, or the petitioners have an adverse decree entered against them. This is true because that which was found as a reason therefor, can not be so utilized, and that which it is contended is a reason therefor was not ascertained. While we shall discuss the present theory of respondent and the questions of law and fact upon which it urges that the decree of the Circuit Court shall be reversed, and a decree entered for the respondent under a mandate from this court, upon the theory it now urges, and endeavor to show that such contention, even if it may now, in the condition here existing be urged, it is utterly untenable, and that the respondent has not strengthened its position by its change of front, and is, in justice, under the law, and upon the evidence, as powerless to maintain its present contention as it would have been to sustain the Circuit Court of Appeals' theory for reversal. Before discussing respondent's present claim for relief, we call to the court's attention, in addition to the presentation made in the original brief, some reason in the record and brief for contesting respondent's claim as to the nature of the suit, its rejection as not being the legitimate subject upon which to determine the cause, its disclaimer of the Jordan and Mountain Gem apex title, its discussion of the pleadings, issues and order of trial, and submit some conjectures, as to the reason why the surface ownership is sought to be made the sole question for decision. We still contend we were right as to the suit tried.

In the brief before the Circuit Court of Appeals (pages 3-4) it is stated that the bill alleges, in response to the claim of the existence of a Kempton vein charged to have been falsely set up by the petitioners, that "the Jordan Mining claim, Lot 64 (describing it) also the Mountain Gem Mining claim, Lot 475 (describing it), and that the said Jordan and Mountain Gem claims *each contains* a lode of rock in place carrying silver and other metals, and that the Jordan lode enters its surface ground across the northeasterly end line thereof, and on its strike and at its apex runs southwesterly in said claim between the side lines thereof for a distance of over 1550 feet; that said lode *then* enters the Mountain Gem claim across the northeasterly end line thereof and continues on its course, and at its apex southwesterly *between* the side lines of the said Mountain Gem throughout the entire length of said claim, and that said lodes in the said Jordan and

Mountain Gem dip northwesterly and at depth toward the said Kempton claim, etc. * * *" In the bill of complaint it is alleged that if there is any vein or lode in the said Kempton dipping or in anywise extending to, or under the said Jordan Extension, Northern Light, Fairview or Grizzly Mining claims, or *either of them*, such vein does not apex in said Kempton Mining claim or belong thereto or form a part thereof, but that the same is a part of and belongs to the said Jordan, Lot 64, and Mountain Gem Lodges, the property of the complainant, which lodes in their depth and between protractions in their own direction of the surface end lines of said claim, pass across and beneath the surface of the said Kempton, enter into and beneath the surface of the said Jordan Extension, and that the ores found beneath the said last named claim in said lodes, are the same that the defendants wrongfully pretend are or belong to a lode or lodes in said Kempton, and not otherwise (Record, pages 4-5). (Also see C. C. A. Brief, pp. 2-3).

It is urged that the assertion here is only that these veins dip under the Jordan Extension, and that this allegation concerning the Jordan Extension shows that it was not claimed that the ore bodies in dispute, or the ore bodies beneath the surface boundaries of the Grizzly, Northern Light, and Fairview were upon the veins apexing in the Jordan and Mountain Gem, and therefore no basis of title was contained in the bill on account of their ownership, and the suit could not be maintained upon that ground. It must be remembered that it is conceded in this case, in all the evidence, and was found in the opinion of the Circuit Court of Appeals, that of the alleged limestone lode, the apex or a portion in its width was within the surface boundaries of the Kempton and the Ashland, and that it extended beneath the claims in controversy, and that the respondent claimed ore bodies beneath their surfaces were found only within its limits, that is to say, within the body of lime between the upper and lower strata of quartzite, and that in the complaint it is alleged that if there was any vein or lode in the Kempton dipping or in anywise extending to or under the said "Jordan Extension," "Northern Light," "Fairview," or "Grizzly," or either of them, the same was a part of and belonged to the Jordan, Lot 64, and Mountain Gem Lodes, the property of the complainant, etc. If the claim in fact was that the ownership was dependent solely upon the situation of the ore bodies beneath the surface of the claims, and that no title from any other source, or be-

cause of the ownership of any other locations, was asserted or relied upon, or was sought to be quieted, we think it a pertinent inquiry to ask why anything was said about the Jordan and Mountain Gem, or about veins apexing therein and being owned by the respondent.

It is urged with reference to the allegations in the bill of complaint concerning Jordan, Mountain Gem apex, etc., that these allegations are found in what is called the charging and not in the stating part of the Bill, and that Equity Rule — provides that the charging part of the bill may be omitted. This is without force, for whether the allegations mentioned are in the charging part, so called, as we think will not be found to be the case, or in the stating part, they are none the less direct, positive and affirmative allegations of the bill as it stood, defining the issues to be tried when the cause was brought on for that purpose, and made the case of the respondent in the ultimate form of the pleadings upon which it rested its title. No authorities are cited to the effect that the court or litigants may disregard direct, positive and affirmative allegations of material facts, like those in question, because they are in what is called the charging part of the bill, and we submit no reason therefor exists, nor for the position that these allegations, which by the equity rule it is provided may be omitted, but are not required to be omitted, may be disregarded, and the bill of complaint, as in fact constituted, freed from the effects thereof or put in any relation toward them other than that which they would hold under the chancery practice of England or with reference to any other allegations of like importance or positiveness made in the stating or other part of the bill.

It is suggested that the allegation were anticipatory, meaning, as we understand it, that being advised in some fashion of a defense which would be made, to wit: that the ore bodies in dispute were owned by the defendants by virtue of the ownership of the apex of lodes in which they were contained, instead of waiting until this answer was made and then amending the bill to respond thereto, since only a general replication is permitted, the bill announced and alleged these facts. While it is true that the so-called charging part of a bill is the portion thereof which charges that the respondent contends and falsely states certain matters which are denied, we think it may fairly be said that the law is that where the mere denial of the matter charged is not sufficient, where without affirmative matter in the charging part, the complainant's bill did not contain allegations sufficient to

maintain the suit, and the bill was amended to meet the defense set up, or which it was anticipated will be set up in the answer, and in any portion of its bill affirmatively stated facts upon which it relied for success in its suit, that these affirmative allegations can not be claimed to be merely parts of the charging part of the bill negativing the alleged claims and contentions of the respondent but are as much allegations, and a substantive part of the bill as any other allegations contained in any part thereof; further, that where these affirmative allegations, in response to what are charged to be the contentions and sayings of the defendant, set up a title and right which negatives a presumption upon which the first asserted right was based, and exhibit a state of facts which makes it impossible for the complainant to succeed save by the establishment of these affirmative allegations, they are essentially material, really make the case of the amended bill, make it impossible to recover upon any other theory than that exhibited by these allegations, and leave the complainant in such bill so amended to recover, if at all, upon the ultimate affirmative allegations of his bill, which show that either he owned the property, the title to which he seeks to establish, by virtue of these affirmative allegations, or not at all. Again the affirmative allegations remove the basis for any possible presumption to support the original alleged title. Whether a bill might thus be properly transformed by amendment, is not material to a consideration of the present position of respondent, since objections were not made upon that ground in the Circuit Court. When attention is called to the situation of the respondent, and it is shown that it may not secure a decree upon what is confessed to be an inadequate premise to its establishment, it is then asserted that it may succeed upon the presumed existence of facts which are affirmatively shown not to exist, and that this will be done by virtue of a presumption which is negatived by the respondent by express allegations, and that these presumptions put upon the petitioners the burden of establishing their own title as against the presumption. The result would be that a claim shown absolutely not to possess the title to ore bodies beneath its surface may be decreed to own them and get a title quieting them. We do not understand that bills in equity may be thus interpreted or employed, or that their allegations may be thus used. May the complainants go forward in a suit, insisting that they rely upon a presumption which might be inferred from the allegations of some facts in a portion of their bill, but open to rebuttal when the bill

in a later portion thereof, in positive and unmistakable language, directly alleges the existence of facts and title which make it impossible that the thing presumed exists, and thereby denies the title sought to be established by reliance upon a rebuttable and merely *prima facie* presumption. Elsewhere in discussing the surface presumption case of the respondent, we call attention to the authorities, upon the extent and under what circumstances this presumption may be employed.

Respondent makes, in answer to the contention in the original brief of petitioners, that the case was tried upon the broad lode apex claim, that the respondent rested in the progress of the trial at the conclusion of the case in chief, after it had offered evidence tending to show the ownership of the four claims, the existence of the ore bodies beneath their surfaces, and the claim on behalf of the petitioners thereto. That it so rested, relying upon the presumption that thereby the respondent had established its case, and that if petitioners contested this position, or did not so understand, it was their duty to have moved to dismiss the case at this stage. We maintain there is no basis for this contention; that such practice does not obtain under any equity practice in the Federal courts; that in equity cases, usually tried upon testimony taken before Examiners and Notaries, and under rules which permit the defendant if he choses to take his testimony first and fix periods within which evidence shall be taken, that the case is heard upon all the evidence, and no opportunity is given and no practice requires that at any stage in the taking of the testimony the respondent shall undertake to secure the dismissal of the case by motion for such a ground as this or must take the risk of submitting the case upon the testimony adduced without introducing evidence in his behalf, and that while the evidence in this case was taken before the Court under the amended rule, it is subject to the same procedure as before and in cases heard upon evidence taken in the usual way. If such had been the practice, the alleged failure would not have changed the pleadings. The great bulk of the evidence was taken upon the broad lode proposition, upon the assertion of title to the ore in question in the respondent, superior to any claim or right of the petitioners, not because of a presumption, but because of alleged apex title thereto. It was not until the close of the entire testimony that the case was ready for hearing or consideration, and then it was that the Court below considered the whole case presented, and at that time it appeared, beyond any possibility of controversy upon the subject, that the ownership of

the ore was not in the surface claims because, according even to the contention of the respondent, the apex was elsewhere, and that apex fixed the title. This being proved, this evidence, upon the theory now advanced, was just as fatal to the position for recovery now stated, as it would have been upon the close of the testimony in chief, upon the theory which was passed upon by the Circuit Court of Appeals. The doctrine of relation, for the purpose of establishing superiority by priority of the Jordan and Mountain Gem over the Ashland and Kempton, was elaborately argued before the Circuit Court of Appeals, and also presented as a theory and claim of respondent, as shown by the record, and this necessarily was for the purpose of supporting the apex claim.

Whatever may now be said concerning the theory of the bill of complaint, there is persuasive force in the data which induced the petitioners to assert in the original brief, that in fact and by the inevitable logic of its allegations it committed the respondent to the claim that it was seeking to quiet the title to the ore bodies where locus was defined as being beneath the surface of the Fairview, the Northern Light, the Jordan Extension and the Grizzly, upon a title derived from the ownership of the Jordan and Gem claims, and if that is not to be the suit here considered, and we are now to accept the assertions and the protestations of the respondent, that the only suit it has brought, the only suit that it has tried and the only claim it makes is that the ore bodies are beneath these claims, and that the petitioners have failed to establish ownership thereto under extra-lateral rights based upon the Kempton bedded and the Ashland fissure vein, nevertheless the Circuit Court of Appeals so understood the suit, and reversed Judge Riner and gave the respondent a decree upon the theory, and the theory only, which is now flatly and completed repudiated by the respondent.

If the theory of defense was that the Kempton and Ashland did not contain the apex of any lode in which these ores in dispute were found, then it would have been sufficient to have denied, in the general replication, the assertion thereof. If, on the other hand, this claim was to be defeated by the fact that the real ownership of the ore was held by virtue of the ownership of older claims dividing the apex in its width with the Kempton and the Ashland, or either of them, there was necessity for the affirmative assertion of this position, and it became and was the ownership relied upon, since this owner-

ship was utterly repugnant to any claim based upon the ownership of the surface of the four claims for it negatived that contention and affirmatively disclosed that those claims did not own the ore because of any *prima facie* presumption with the effect that this presumption was of no consequence in the trial. At pages 35, 36 and 37 of respondent's Court of Appeals' brief these matters are again presented, as they are in the second specification of error, pages 82, 83 and 84 of the same brief; also in specification 3, page 84. The contention in that brief, as we apprehend it was, not that the ownership of the ore in controversy was in the respondent as the owner of the surface of the four claims, but that the existence of the ore beneath them was merely *prima facie* proof of such ownership (Respondent's Brief in Court of Appeals, page 10). At page 141 of that brief the position of respondent is stated in black-faced type, as follows:

"The ore bodies in dispute are contained in one part of the lode, consisting of an older mineralized bed of limestone lying between walls of quartzite clearly separating it from the surrounding country. *The plaintiff owns the oldest location upon a portion of the width of the apex of this lode, and is therefore entitled to extra-lateral rights for the entire width of the lode.*"

This statement is followed by the assertion that,

"Our claim is that there is but one lode or vein to be dealt with, and that it includes all of the ore bodies in dispute; that the ore in the so-called vein or veins of defendants are but one of the many ore bodies which are found in a great lode and constitute but a small part of that lode. * * * "

At page 143 we have the statement that:

"Upon the Jordan lime belt was located the Jordan, Lot 64, and so located that the lode passes through the easterly end-line thereof and thence courses westerly parallel to and keeping within the side lines thereof for a distance of about 1500 feet, and thence passes into the Mountain Gem, Lot 475, located upon the same line belt, and thence traverses that claim from end to end. These two claims belong to the plaintiff and include much the greater part of the width of the apex of this lime belt, which we claim is a lode. The Kempton covers a portion of the width of the lode at its apex but it is a later location than either the Mountain Gem or the Jordan, Lot 64, and

hence we claim that we are entitled to the entire lode on its dip between the planes drawn through the end-lines of the Mountain Gem and extended indefinitely in their own direction, and also to all that part of the lode on its dip lying east of the east end line of the Gem extended in its own direction up to a plane drawn through the east end-line of the Jordan, Lot 64, extended indefinitely in its own direction."

In the April brief in this Court, pages 1, 9, 10 and 11, the respondent states its claim with reference to the broad lode substantially as in their brief before the Circuit Court of Appeals, above quoted.

From all which it is apparent that the Circuit Court of Appeals understood that the respondent was urging its title upon the ownership of apex rights which, if they existed as contended for, made it utterly impossible, as a matter of law, that the Circuit Court of Appeals should hold that the ore in question belonged to the respondent because it owned the surface of the four claims, for in the very same breath with which it made that claim and announced that ownership, it urged the existence of facts which destroyed any presumption, temporary and rebuttable as the presumption urged is, to ownership because of ownership of the surface, for the controlling reason that the apex in fact was elsewhere, upon which condition there was and could be no ownership in the owner of the surface because thereof.

The theory of the mining law is that upon locations prior to 1872 the ownership was of the lode upon its extent into the earth, and not of any limited surface area nor because of the ownership of the surface, and under the Act of May 10, 1872, (U. S. Revised statutes, Section 2,323) that the locator was the owner and entitled to the exclusive possession and enjoyment of the surface, and of all lodes throughout their entire depth having their tops or apexes within such surface. Wherefore no title, save by way of *prima facie* presumption owing to ownership of the surface, as attaches to the owner of the surface, when it appears that he is not possessed of the apex of the lode, or that the apex is elsewhere—and assuredly when it is so situated with regard to other locations as to give them the right to follow it upon the dip—there is no conceivable title whatever, nor support or further grounds of longer indulgence of presumption of ownership by virtue of ownership of the surface. The allegations with regard to the Jordan and Mountain Gem seems to be meaningless and purposeless, unless there was attached to them the significance which the Circuit

Court of Appeals appears to have attached thereto and which the petitioners understood was intended thereby.

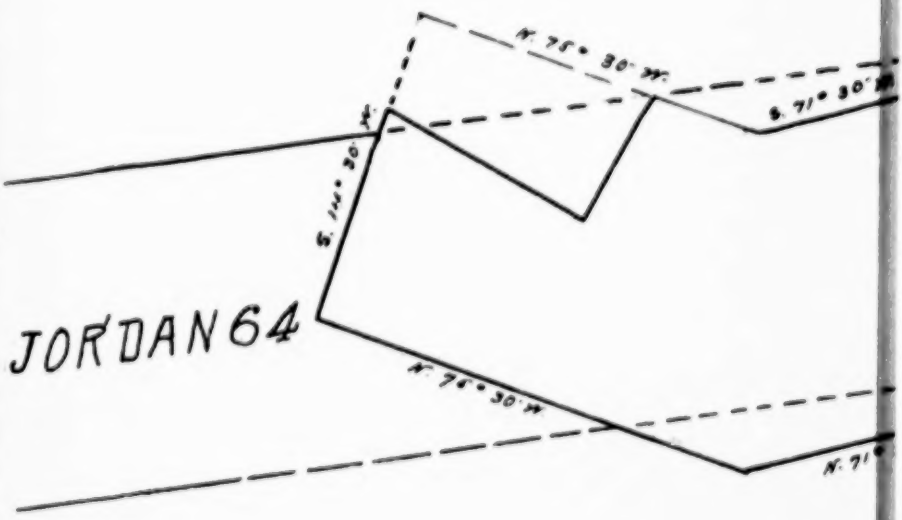
The reason assigned by respondent in their October brief for discussing therein the broad lode theory, upon which they do not rely for recovery, is set forth at pages 186 and 187. Not withstanding what has been said about the issues here for determination, we have an extended discussion of the broad lode, and an attempt, while disavowing its necessity or pertinency, to sustain the Circuit Court of Appeals' findings and the basis employed by that Court for its decree. We have no right, perhaps, to question the reasons assigned for persisting in a discussion of a needless question, and the investigation of facts without pertinency to the case at bar, and the necessity imposed upon opposing litigants and the Court to wade through many pages of testimony and discussion for the academic purpose of ascertaining whether the Circuit Court of Appeals reached a correct conclusion upon an immaterial subject, or rightly determined the facts bearing upon a cause which is not yet brought and is not before the Court for its investigation. We might ask or even possibly insinuate, if the motive of the inquiry and suggestion might not be misinterpreted, whether there are other possible reasons to be inferred from the briefs for this last discussion and for the present theory. Was the decision of the Circuit Court of Appeals renounced with what must have been a full perception by respondent of the radical character of a step in which the basis of decision, by a court of the learning and character of the Circuit Court of Appeals, is cast aside, and with an understanding of the inferences which might be drawn therefrom as to the ability of the litigants to sustain such findings, solely that the case might be here presented freed from complications with immaterial matters, and that this Court should determine the very case presented, limited to the rights based upon the presumption now contended for? May it have been that when respondent considered the presentation made on its behalf, reviewed the evidence and the record and analyzed the opinion of the Circuit Court of Appeals, and the fact that this Court had brought the case here by its writ of *certiorari* for review and determination, with all the powers possessed in a case brought before it upon an appeal, it doubted its ability to maintain the decree upon that decision? Or may it have more clearly and strongly realized by the respondent, in the sear and sober days of October, than in the budding days of April, that upon the present record, the

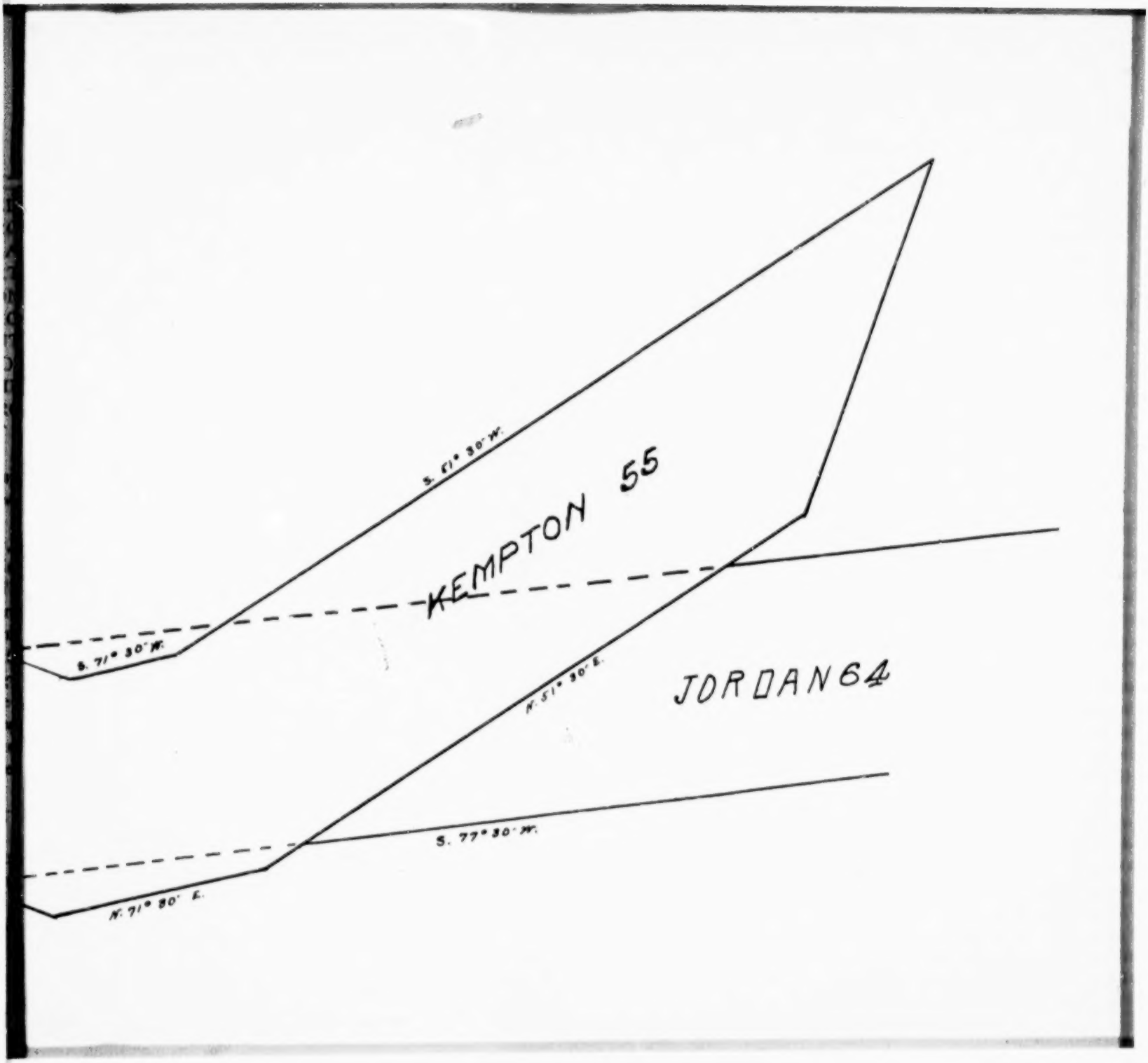
broad lode, with its vast assertions, enormous assumptions concerning the character and contents of the limestone as a lode, could not stand the punctu ings made in it by the extended workings through barren and unshattered limestone, and thereupon had concluded that it did not care to be passed upon as to this contention in this cause, but would withdraw it from the case, prevent the determination of this Court constituting *res adjudicata* with reference to it, and save it for another litigation at a more convenient season, and then may it have concluded that it would not be put in the attitude of running away from a claim it had urged and therefore, after five months of meditation and reflection upon the subject, have determined that while it was a desperate course to abandon the Circuit Court of Appeals' decision at the same time seeking to uphold its decree, it was the only way out, and afforded a chance to urge upon this Court that it should make findings which the Circuit Court of Appeals had not made and against those which must have been presumptively and really were found by Judge Riner to be the facts? That is, while still loudly thundering for and asserting that the case tried was not the case which should have been tried, yet the results were right; escape from losing or risking the decision upon that field and without openly and directly conceding that it could not be maintained as to the finding of fact, and that equally must it fail in an effort to support the law as declared and applied by the Circuit Court of Appeals in its opinion, it would make a bold front with regard to this entirely irrelevant showing. We may not know, may only guess or conjecture upon these subjects, but submit there is fair ground for having asserted in the oral argument, and of reiterating here, the claim that the respondent turned its back upon and ran away from the Circuit Court of Appeals' theory and decision, because it was afraid of it, did not believe it could be sustained, because it did not dare risk a determination of this case upon it, because the Circuit Court of Appeals in its decision had proceeded upon a manifest misapprehension of the physical facts upon legal determination, not only in conflict with the decisions of other Circuit Courts of Appeals, with the consensus of opinion of courts generally considering these matters, with authors of recognized authority who had written upon this subject, but with the decisions of this Court. We may not and do not desire to attempt to bind the respondent by our reflections, conclusions and conjectures upon this subject, but submit that they are countenanced, if not sustained, by the situation.

III.

THE CIRCUIT COURT OF APPEALS, IN ITS OPINION, FELL INTO ERROR AS TO THE POSITION UPON THE GROUND OF THE BOUNDARIES OF THE JORDAN CLAIM, AND AS TO THE PORTION OF THAT CLAIM PATENTED, AND AS TO THAT CLAIM AS PATENTED CONTAINING ANY PORTION OF THE ALLEGED BROAD LODE APEX OVER THE ORE BODIES IN DISPUTE, AND THEREFORE ERRED IN THE CONCLUSIONS DRAWN THEREFROM, AND IN FINDING THAT THE TITLE TO ANY PORTION OF THE ORE IN CONTROVERSY WAS IN THE RESPONDENT BECAUSE OF ITS OWNERSHIP OF THE JORDAN CLAIM.

Respondent, in answer to what we claim is a clear and conclusive demonstration of a misapprehension of the facts as to the position of the Jordan claim with reference to the ground in controversy, and of the apex of the limestone stratum with reference to that claim by the Circuit Court of Appeals at page 281 of the October brief claims that the words "as patented" were inserted in the opinion after petitioners had called to the Circuit Court of Appeals' attention its misconception of the facts upon this point, and seems to consider this, and the further assertion that the Circuit Court of Appeals was speaking of the "Jordan and the Mountain Gem lines as patented," a complete answer to our contention. It is, no doubt, the best response which ingenuity can devise, but is no answer at all. Upon any theory, our contention concerning the location of the Jordan boundaries with reference to the Ashland and Kempton claims, as to the very backbone of the decision, is that it is manifest that the portion thereof covering the apex of the broad lode to the ore bodies in dispute was patented entirely to the Kempton and Ashland claims. Not a portion merely but the entire width of the Jordan claim was in conflict with the Kempton, and patented as a part of the Kempton claim. No part of the Jordan claim "as patented" contained any portion of the apex of the limestone stratum covering the ore in dispute, and therefore, and as pointed out in the original brief, the Jordan could not be utilized, as was in fact done by the Circuit Court of Appeals, as the


N. 75° 30' W.
S. 71° 30'
S. 14° 30'
JORDAN 64
N. 75° 30' W.
N. 71°


KEMPTON 55
JORDAN 64
S. 71° 30' W.
S. 71° 30' W.
N. 71° 30' E.
N. 71° 30' E.
S. 77° 30' W.

basis of a decree that any portion of the ores in controversy was owned by the respondent.

The importance of this condition is seen when lines are drawn through the Jordan claim parallel to its end lines, at the extremities of the portions in conflict with the Kempton claim; for lines thus drawn show that the area patented to the Kempton covers the alleged apex of the ore in controversy, and therefore that all ownership based upon this apex is excluded from the Jordan, included in the Kempton, and hence no title is in the respondent by virtue of ownership of the Jordan claim. This is true, and the misconception is none the less pronounced, whether the language employed by the Court be applied to the Jordan and Mountain Gem claims and their boundaries, or to the boundaries of those claims "as patented."

In our original brief we quoted the language of the Circuit Court of Appeals as modified. To illustrate more clearly that for which we have contended, and that the Court may get the benefits of a map which contains the data applicable to this controversy, unconfused by the presence thereon of other data unnecessary for this consideration, we present at page 23 hereof a map showing the position of the Jordan boundaries with reference to the boundaries of the Kempton claim; and again, upon the "Kempton limestone" map at page 23 hereof, the position of the limestone apex with reference to the boundaries of the Kempton claim as patented, from which it appears that no portion of the limetsone apex covering the disputed ore bodies is in any portion of the Jordan claim "as patented." No difference exists between respondent and petitioners as to the conflict between the Jordan and Kempton claims, or as to which claim patented the conflict. This appears from maps set forth in respondent's October brief, as well as in our original brief.

The extra-lateral rights of the Kempton claim, proceeding upon the theory that the limestone stratum is a lode, and that its apex is the apex of a lode, are defined by planes extended through the staked end-lines being lines 1-2 and 5-6 of that claim produced across the Jordan Extension, Northern Light, Grizzly and Fairview claims, and will be seen from an examination of the "Kempton limestone" opposite map, page 23 hereof, to cover all the ore bodies in dispute. The October brief is significantly silent upon the claim of any apex rights to the disputed ore bodies in the Jordan claim.

We, therefore, without further discussion, assume that it is virtually conceded, as it is absolutely demonstrated, that the Jordan claim is of no significance whatever in this suit, either as the basis for a decree of ownership of the ores in question in the respondent (a contention now absolutely abandoned), or as defeating apex rights in the petitioners.

IV.

THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN FINDING THE POSITION OF THE BOUNDARIES OF THE MOUNTAIN GEM CLAIM, THE AREA PATENTED THERETO, ITS RELATION TO THE LIMESTONE APEX THE AMOUNT OF LIMESTONE APEX CONTAINED THEREIN, AND IN ITS DETERMINATION THAT ANY OF THE ORE BODIES IN CONTROVERSY, UPON THE THEORY THAT THE LIMESTONE STRATUM CONSTITUTED A LODE, WERE THE PROPERTY OF THE RESPONDENT BECAUSE OF ITS OWNERSHIP OF THE MOUNTAIN GEM CLAIM.

Bearing in mind that respondent does not now seek to maintain the decision of the Circuit Court of Appeals by the assertion of ownership of the Mountain Gem claim and yet devotes many pages of its October brief to a vindication of the correctness of this abandoned and irrelevant determination, it is important to call attention to the error into which, we still contend, the Circuit Court of Appeals was led with reference to the Mountain Gem claim, its position, its extent, and its relations to the Kempton claim and to the apex of the alleged limestone lode.

The demonstration presented in petitioners' original brief concerning the rights of the respondent found by the Circuit Court of Appeals upon the ownership of the Mountain Gem claim, exhibited what we think is shown to be a manifest error upon the part of that Court, and therefore made its decision untenable; and this presentation has in no wise been refuted by anything presented in the October brief, the April brief, or orally, on behalf of respondent. For the better understanding of the Mountain Gem claim's relations to the Kempton claim, there is exhibited upon the map opposite this page, the true

positions of the Mountain Gem and Kempton claims, and a true presentation of what was patented as the area of the Mountain Gem. This map is but an abstract from maps in the record before the Court in briefs, and of the larger maps before the Court at the oral argument. By excluding confusing lines not needed for this particular examination, and exhibiting the true relations of the boundaries of these properties, we make clear our contentions, and so present them that the Court may at once see the force of the argument, and the significance of the facts presented in the original brief and herein upon this subject, and that they are in no wise met in respondent's briefs. It is at once seen that the position of the Mountain Gem claim was not correctly depicted upon the maps of the respondent, nor correctly stated in the opinion of the Circuit Court of Appeals, if this map presents them correctly, which we maintain. In part, this was shown by Exhibit C, opposite page 26 of the original brief. Elsewhere we present additional proofs to those stated in the original brief, demonstrating that the position we assign to the Mountain Gem with reference to the Kempton is the correct one, and that the position given to this claim upon the maps of respondent, and adopted by the Circuit Court of Appeals, is utterly erroneous. There is on file in this Court, introduced in evidence at the trial by the respondent as a part of Exhibit U, a map being the real patent map, and exhibiting the patent survey made by Wythe Denby, surveyor, showing the relations of the Kempton and Mountain Gem to be exactly as we contend they are and showing that the maps of them made by the respondent, and by us transferred from their map on to one of our maps, are erroneous, and that this position is based upon a survey made by J. Fewson Smith, surveyor for the respondent, who had the controversy to which we elsewhere allude with Jessen concerning the position of certain floating stakes claimed by him to have been found upon the ground, and which map was abandoned in patenting the claim, and should not have been made use of, we assert, in the presentation of this case. Had it not been so used, the important error of which we complain would not have been made.

Elsewhere in discussion of this map and the subject of boundaries we refer to the original brief upon the subject, and call to the Court's attention other parts of the testimony and record and surveys which demonstrate that the original brief in its contentions was well founded, and that the attempt to justify the maps of respondent by matters set

up in the October brief is ineffectual, and leaves the situation just as our original brief presented it. The true position of the limestone apex was not, as we have also asserted, correctly indicated with reference to the boundaries of the Mountain Gem and Kempton claims; and we have indicated by dotting the boundaries of the true position thereof upon the "Kempton limestone" map, opposite page 23 of this brief, the actual relations of the limestone outcrop of the Kempton and Mountain Gem claims "as patented." We elsewhere in this brief present a demonstration of the correctness of the position we assign to the limestone apex; and our response to the criticisms contained in the October brief of our evidence of that position, and as well our own comments upon the contentions of the respondent with reference thereto.

The map to which we have called attention gives a pictorial illustration of the fact that the limestone outcrop's position was inaccurately presented to and radically misconceived by the Court of Appeals, with the result that it made this error the basis of decision, when without it, we feel justified in claiming the decision of the Circuit Court of Appeals would not have been made. The causes of the error which we have sought to correct and have pointed out are the erroneous locations of the boundary-lines, relatively, of the Kempton and Mountain Gem claims, both upon the ground with reference to each other, and as presented upon respondent's maps, and the erroneous position ascribed to the limestone apex upon respondent's maps. The positions given to the Kempton claim and its boundaries upon petitioners' maps, and upon the maps in the original and this brief, are those agreed upon by Jessen and Smith, while the Mountain Gem's position is that which is fixed by its patent and patent survey, made by Surveyor Denby and introduced in evidence by respondent.

In view of the claim that the Mountain Gem as patented is older than the Kempton claim, it is worthy of consideration that in order that this position shall be maintained it must be assumed that the area covered by the Mountain Gem claim as patented and its relation to the Kempton claim is that which was given it by its original location, as evidenced by its notice of claim or location certificate. For until May 10, 1872, at the earliest, and we think, as we demonstrate elsewhere, not until by some affirmative action it had so defined the boundaries of its claim as to secure the benefits of the Act of May 10, 1872, and to include the area patented to the Mountain Gem

claim in 1898, the Mountain Gem rights were confined to its discovery lode, which discovery lode ran north and south, across the strike of the limestone stratum, instead of east and west, or with the limestone stratum strike as that claim is now patented, and which position, so far as the record discloses, was first taken when the patent survey therefor was made by Denby.

Upon the "Kempton limestone" map, opposite page 23 hereof, lines have been drawn, consisting of projections of the end lines of the Kempton claim, indicating, upon the assumption that the limestone is a lode, what the apex rights of the Kempton claim are, and showing that they cover the ore bodies in controversy. The map designated "actual position of Mountain Gem as patented," opposite page 24, shows the actual area patented to the Mountain Gem claim. From these it appears that the average width of limestone apex within the Mountain Gem claim is less than 40 feet, instead of near 200 feet, as presented by respondent's maps; and that the Kempton claim includes substantially 200 feet of the width thereof; instead of the less than an average of 50 feet and nothing at the northern end indicated by respondent's maps; and the limestone passes through both end lines of the Kempton claim, in fact, instead of its northern or hanging wall passing through two portions of the broken line constituting a part of the southerly side line of the Kempton claim. This condition, coupled with the fact that the Kempton patented all the area in conflict with the Mountain Gem claim, and patented nearly 200 feet in width of the apex of the very lode upon which the rights of respondent by virtue of ownership of the Mountain Gem claim are based by the Circuit Court of Appeals, awards the ownership of the entire width of the limestone vein upon its dip to the Kempton, and covers all the ore bodies in dispute.

At page 26 of the original brief, the claim or notice of location of the Mountain Gem is found, in which it is recited that "said claim is situated W. of the Pollock commencing at a cut in the hill and running S. 200 feet to a gulch, and N. 1,400 feet from said cut parallel to the Pollock lode," thus giving the original discovery lode of the Mountain Gem claim a north and south course, crossing both side lines of that claim as now presented, and, according to the contentions of respondent, converting them into end lines, while the boundary lines of the Gem as now depicted upon the maps of respondent give the claim an east and west direction in its greater

length of only 470 feet as against 1,600 feet on the North and South direction. The result would be, upon respondent's contention as to the effect of crossing side lines on the strike of the apex, that the Mountain Gem could have no apex rights upon the limestone lode.

V.

THE MOUNTAIN GEM AND JORDAN COMBINED MAY NOT BE USED AS ONE CLAIM FOR APEX PURPOSES; NOR IF THEY COULD, WOULD THEY THUS COMBINED FURNISH ANY BASIS FOR THE ASSERTION OF APEX RIGHTS TO THE ORE IN CONTROVERSY, OR ANY GROUNDS FOR DEFEATING THE APEX RIGHTS OF THE KEMPTON AND ASHLAND CLAIMS TO THE ORE IN DISPUTE, OR ANY PART OF IT.

Extra-lateral rights by virtue of the ownership of the apex of lodes depend upon the individual claims on behalf of which they are asserted, and may not be supported by a combination of separately located and severally patented claims, none of which possess extra-lateral rights, upon the theory that these severally located and patented claims combined may do so. Apex rights as to the vein, or any part of it, contained in Claim A, patented alone, must be determined solely by what is shown to exist in that claim with regard to the apex and the lode; and so with Claims B and C likewise severally patented and Claims A, B and C may not be so united or combined into one mine or alleged claim as to give apex rights to this combination of claims. There is no ground upon which we can conceive that this position may be disputed. If the apex is a composite of a number of separately located and severally patented claims, how are the end lines, the side lines, the apexes, the relative ages of these and claims in conflict with them, and numerous other important and controlling questions, to be settled with respect to the combination? To each of such claims is accorded the ownership of the surface ground within its boundaries, and of the lodes having their tops or apexes within these boundaries, to the extent that upon their dip, where these veins pass beyond the side lines of the claim, the ores therein lie within planes extended through the end lines of such claim, which end lines must be parallel. Therefore, if Claim A should have an apex extending through its

apex rights on account of the ownership of this claim or the apex within it; and if Claim B should be found in like condition, but it should happen that one of its end lines was parallel with an end line of Claim A, the two claims could not be combined, and the two parallel end lines of these different locations separately patented utilized as the basis of extra-lateral rights. The same result would necessarily follow with reference to the position of the apex and its relation to the boundary lines of these claims. If, for example, Claim A is so situated with reference to the apex that it does not have extra-lateral rights, and the same is true as to Claim B, then the two claims can not be united to create an apex right no part of which either of the individual claims possessed.

We mention this subject because, in the course of respondent's October brief, it is said that the claims of the respondent were mined as one mine; and in the attempt made in the brief to explain and justify or excuse the finding of the Circuit Court of Appeals with reference to the position of the boundary lines of the Mountain Gem and Jordan and Kempton as related to the limestone apex, the Mountain Gem and Jordan are coupled together for apex purposes as though they were one claim, and in response to an interrogatory from the Court with reference to work done upon the Mountain Gem claim and the ores in controversy, the assertion was sweepingly made that the respondent had mined for forty years upon its mine, thus applying, by this inclusive remark, work done thousands of feet away upon other locations, and long prior to the acquisition of title to the claims involved in this litigation seemingly, at least, to these claims. However, in its bill of complaint respondent defined the position and extent of the several lodes respectively alleged to be contained as to their apexes in the Jordan and Mountain Gem claims, and there treated these claims, and the rights based upon them, as separate, as the law plainly requires. Were the law not as we have above stated; if respondent could legally assemble several such claims for the purpose of so adjusting the boundaries thereof with relation to an apex as to secure or create by this combination apex rights of which no part existed in the several claims, that doctrine is not available here, since the positions of the Mountain Gem and Jordan boundaries, the limestone apex in relation thereto, the exclusion from the patents for these claims, the inclusion in the patents to the Kempton and Ashland claims, preclude such result. There is nothing in the Jordan which can be

combined with that which is found within the Mountain Gem, as we have pointed out in the original brief.

As to the ores in controversy there is neither an apex nor any part of an apex within the territory patented to the Jordan claim; on the contrary, the significant and controlling fact appears that all of the apex which was included in the boundaries of the Jordan claim as surveyed was conceded to and patented by the Kempton and Ashland claims. Therefore, conceding for the sake of argument only that the limestone stratum is a lode, and putting our imagination with reference to it to the severest strain, there is no title in respondent by virtue of the alleged existence of the limestone lode, or by virtue of the ownership of the Jordan and Mountain Gem claims, or any combination of them.

VI.

RESPONDENT, BY ITS EVIDENCE, AND, WE CONCEIVE, BY ITS BILL OF COMPLAINT, AFFIRMATIVELY ESTABLISHED THE FACT THAT IF THE LIMESTONE STRATUM IS A LODE, NO PORTION OF ITS APEX WAS WITHIN THE SURFACE OF THE GRIZZLY, FAIRVIEW, NORTHERN LIGHT AND JORDAN EXTENSION CLAIMS, AND THEREFORE THAT THE OWNERSHIP OF ALL ORES THEREIN BELONGED TO OTHER CLAIMS, AND THEREFORE COULD NOT BE A PART OF THE OWNERSHIP OF THESE CLAIMS.

It is shown affirmatively by the respondent, and is an undisputed fact in this case, and also shown by the evidence of both parties, that if the limestone stratum is to be taken to be a lode, no portion whatever of its apex is within the surface boundaries of the four claims upon the ownership of which the respondent now stands. Since the apex of the ore bodies beneath these four claims is thus demonstrated to exist elsewhere, and according to the contentions of the respondent so as to give the ownership thereof to the petitioners if the relations of the limestone apex to the Kempton claim are as the petitioners assert as a matter of fact, or else to the Mountain Gem claim if the position of the lime stone apex to the Mountain Gem is as respondent maintains, waiving for the moment the effect of the patenting of the

conflict between the Kempton and Mountain Gem to the Kempton claim, and proceeding upon the theory so elaborately argued and so strenuously sought to be maintained, notwithstanding its disclaimers in the October brief, there is no basis for a decree quieting title in respondent to the ores in dispute by virtue of the ownership of the surface of the four above-named claims upon any presumption applicable to the situation. Upon these facts these claims can not be the source of title to this ore, and any asserted *prima facie* presumption indulged in the progress of the trial for the purpose of ascertaining at different stages where the burden of proof rests, and which enables a defendant in possession to require a plaintiff asserting extra-lateral title to the ore to prove a right to go beneath the surface of such claim with a title to the ore in dispute, may not be invoked for the purpose of sustaining a decree that the owner of the surface, who is also the plaintiff, and must therefore, as we elsewhere point out, allege and prove his title upon its own strength, upon the whole evidence, to the property which he seeks to have quieted, is the owner, when that plaintiff has proved, or when it is conceded or established in the case that the apex which has the ownership of the ores in question is without the boundaries of the claim thus in plaintiff's possession as to the surface. The establishment of the apex outside of the claim negatives this asserted but rebuttable and purely temporary presumption, even in the cases where it would be admissible (and we do not concede that it obtains at all on behalf of a plaintiff in a suit to quiet title upon the conditions here shown), whatever the evidence may be as to who owns and by virtue of what claims that apex; and therefore, as to the ore beneath the surface of the claims in question, the fact indisputably is that the ore is not owned by respondent as a part of these four claims. A court with such a condition of proof and conceded facts before it is not at liberty to adjudicate that the title to this ore is in the owner of the surface of the claims as a part of said claims, and thereupon quiet title thereto, even against one who has shown no right whatever; for this would be to make the failure of a defendant in a suit to quiet title, who has not filed a cross-bill to support a right to the property in question, give title to a plaintiff who has utterly failed to establish it by its own evidence; and this we maintain and cite authorities to show may not be done.

Since the plaintiff must succeed upon the establishment of his own title, and has the affirmative upon this position throughout the

progress of the suit in which it is sought to be established, when all the evidence is before the court, and it appears that he has failed so to do, especially when his suit is upon the theory, claim and allegation that his title thereto is due to and dependent solely upon the ownership of the surface, he must necessarily fail.

The theory of the provisions of the Act of July 26, 1866, and the Act of May 10, 1872, upon the subject of ownership of ore in claims located upon the public domain, is that the ore is within a lode, and that it belongs to the owner of the apex of that lode; that no claim can be located or have legal existence, rightfully unless within its boundaries there is found the apex of a lode, and that notwithstanding the ore in a lode may be beneath the surface of a claim, which does not have the apex thereof, there is no right thereto in the owner of that claim by virtue of that fact, but that the owner of the ore is he who has a claim or location, whether younger or older than the claim beneath whose surface the ore is found, in which is contained the apex of the vein. It has been repeatedly adjudged that a younger claim located upon the apex has a right to the ore beneath the surface of another and older claim. Even were it sufficient for a complainant in a bill to quiet title to allege that he was the owner and in possession of a certain mining claim, and that there was beneath its surface, and constituting a part of it, ore bodies which were his property, and that the defendant falsely asserted title thereto without the complainant's asserting that the ore bodies thus found were upon a vein having its outcrop in his claim, a matter which it is not necessary for us now here to discuss or consider, yet it is perfectly clear that if an answer should be put in which denied the allegations of the bill, and alleged that the ore bodies in question were upon a vein having an apex within territory of the defendant, and a general replication should be filed, and the case tried upon these issues, the complainant, upon proving by its own evidences that the ore in controversy apexed outside of its claim, would have failed, notwithstanding any *prima facie* presumptions which might be invoked to establish that these ores were part of its claims, would have disproved them, for it would have shown that instead of being a part of his claim it was a part of some other claim—the claim which had the apex of the ore body.

The effect of the contention of the respondent concerning the broad lode, persisted in through many pages of its October brief, is not only upon its own theory irrelevant, but destructive of the claim it

does put forth for a decree. Whether the object of this extensive argument is to vindicate an immaterial contention or position of the respondent, or to justify the finding upon which the Circuit Court of Appeals erroneously based a decree, the result, logically, is that, conceding all that is claimed by the respondent on behalf of the broad lode and the Mountain Gem claim, it defeats its present suit, and destroys any basis for a decree in its behalf therein; for the result is that the respondent owns the ores in question by virtue of the ownership of the Mountain Gem, and not of the Northern Light, Grizzly, Jordan Extension, and Fairview; and whatever decree it might be entitled to in a proper suit based upon that title, it is not entitled to a decree that it owns the ore bodies as part of these four claims.

To avoid this result, if we grasp the true nature of respondent's contention, it would have the court find that as the result of an exploded and refuted presumption it should have a decree, not because it has shown that it owns the property by virtue of the title relied upon, but in the teeth of a directly contrary showing, solely because the defendant has not affirmatively established a title thereto. It was, of course, possible that it could have been determined, under the circumstances now asserted, and upon the claim now made by the respondent as to the rights it asserts and the title upon which it relies, that it was not entitled to a decree, and its bill must be dismissed for the very reason that its case was that it owned the ores in question by virtue of its ownership of these four claims, whereas its evidence indisputably and unmistakably demonstrated that this was not true, and that its ownership, if it had any, was by ownership of other claims and that whether the respondent or the petitioner owned the ores by virtue of apex or extra-lateral rights, the respondent did not own them by virtue of its ownership of the Jordan Extension, Fairview, Northern Light, and Grizzly Claims.

True it might have urged if the suit is what it claims, that the decree should be so framed as not to be an adjudication upon any title it might assert by virtue of its alleged ownership of the apex of the vein containing this ore.

Upon the showings and claim of respondent with regard to the limestone lode, and upon the assumption that it correctly states the law to the effect that the owner of a part of the width of an apex may follow a vein upon its dip and hold it against all the world, save only the owner of the remaining portion of the width thereof who has

an older location, the ownership of the ore body in question is either in the petitioners by virtue of their ownership of the Kempton and Ashland, and their ownership, concededly, of a portion of the width of the apex, or else in the respondent by virtue of its ownership of the Mountain Gem, and is in no event in the respondent by virtue of its ownership of the Grizzly, Fairview, Northern Light, and Jordan Extension.

In examining the views now urged by respondent, that it relies upon a presumption of ownership by ownership of the surface, and the failure of the petitioners to show title to the ore under its claims, although the four claims of the respondent as located had no ownership of the ores beneath them, it is transparent that this flies in the very face of the position still contended for by respondent, as we conceive its contention as to the broad lode and the Jordan and Mountain Gem claims that there is an apex ownership of these ore bodies in the respondent by virtue of its ownership of the Mountain Gem and Jordan claims; moreover there was nothing set up in respondent's amended bill to the effect that the petitioners were without right to follow a vein apexing within the Kempton claim because that vein upon its strike crossed two side lines which became thereupon diverging end lines; but the assertion was that this right did not exist because any vein which apexed within the Kempton had its apex so within the Jordan and Mountain Gem claims as to confer title to the ore bodies upon the owner of those claims.

After all, however this case may be viewed, it comes back to the proposition that either the respondent muust succeed because it owns the apex of the limestone stratum, and that this stratum is the lode in which the ore is found, or it may not succeed at all; and this latter is the inevitable result, is the necessary result because a recovery upon the apex theory, upon respondent's present position, as it was before upon the facts and law, is made utterly impossible.

This is not a suit in which respondent says, "The ores are beneath the surface of these claims; the apex is outside of them, but that apex is so situated with regard to the claims which I own and the claims which the petitioners own that there are no apex rights with reference to it, and therefore the ownership falls by virtue of that fact to the claim beneath whose surface the ore is found." If that position should be taken, it would relieve this case of many of its complications and confusing details, and free counsel and the court from much labor

in the examination of evidence and legal contentions; and would base respondent's claim entirely upon the contention that the ores are the property of the respondent because they are not the property of the petitioners, and this because no apex right to them exists in either the respondent or the petitioners so far as this suit is concerned. What the effect of such a claim would be, since it is not made, need not be discussed, but we have herein given our views of the law and facts upon respondent's case, which it alleges is close to if not identical with the case supposed.

Respondent in its Bill of Complaint did not assert that while petitioners had the apex of the ores in the Kempton and Ashland claims, they were so situated with regard to the boundaries of those claims as to confer no extra-lateral rights, and therefore the ownership was in the owner of the surface. Respondent did not allege that while petitioners had a portion of the apex of the limestone lode, this portion was so situated with reference to the boundaries of the claims that no apex rights existed therein, and therefore there was no apex title in the petitioners to the ore bodies in question, and for that reason they fell to the ownership of the surface.

The inconsistency of the attitudes and positions of the respondent, and the complications therefore surrounding the present consideration of this case, are manifestly due to what is now disclosed to have been the purpose of the respondent to try the case between it and the petitioners by piecemeal; to secure an adjudication, if possible, to the ore bodies in dispute because of presumptions based on the ownership of the surface, and alleged defects as to the relation of Kempton and Ashland apexes to the boundaries of those claims; but being left free, in the event that they failed in this suit, to assert in other litigation that they owned these same ore bodies by virtue of their ownership of the apex thereof in the Jordan and Mountain Gem claims. Having, if their present positions are accepted, thus divided up their title, and thus presented one contention, and then having made proof which destroyed that contention, they may not complain of the result, and that they are without standing in this court to sustain the Circuit Court of Appeals decree because it was based upon a finding and title not relied upon, and which affirmatively denied the possibility of success upon the theory embodied in the suit, and now urged as the basis of a decree for respondent. If by an attempted subtle discrimination and distinction between the stating part of a bill of com-

plaint and the charging part thereof, and upon the order of the introduction of proof, the respondent has involved itself in a disagreeable and awkward position, and one which compels it to disavow and reject, with all the necessary conclusions drawn therefrom, as the basis for a decree the theory of the Circuit Court of Appeals as to the suit, and to turn to another contention which that Court's findings make impossible, it is but another illustration of "the enginer hoist by his own petar."

We submit it was the duty of the respondent, when going into a Court of Chancery to quiet title to property to bring into that suit its real title to the property, and all the titles it had thereto; and that if it failed so to do, and especially where it intentionally abstained from so doing for the sake of other contentions and advantages to be had therefrom, it is in no position to avoid, by asserting this to have been its purpose and its act, the necessary effect of evidence which it introduces, and which, while not warranting a decree upon the title it tends to establish, does prevent a decree upon the title and claim asserted and litigated. There need be no hesitation, we submit, on the part of the court to adopt these results and apply these principles; for, as we think we clearly establish, there is in fact no merit whatever in the claim of the respondent to a decree to the ore bodies in question upon the contention that the Kempton and Ashland claims are not shown by the petitioners to entitle petitioners to the ores in dispute. We elsewhere add somehing by way of refutation to contentions in the October brief to what we have urged in our original brief upon this latter subject.

VII.

Respondent is not entitled to maintain its present asserted suit upon presumptions from ownership of surface, since it is plaintiff in a suit, and must succeed upon the strength of its own title and not upon the weakness of the defendant's; for it appears from the evidence that any presumption of apex within its surface boundaries is disproved: that the apex of the ore bodies in question is without its claims; that its own evidence and claim is that the apex thereof is in the Mountain Gem and Jordan, in such relations as it asserts that apex rights exist thereon, and because the petitioners assert title to the ore bodies in question by virtue of apexes within their claims.

There is some conflict and confusion in the cases with regard to presumptions of ownership in mining claims, because of the ownership, or ownership and possession, of the surface of such claims and of the possession of ore bodies beneath the surface thereof by the owners of the surface. Respondent has taken some of these authorities, with the doctrine of which in the cases to which they were applied we have no quarrel whatever, and attempts to make them establish, not merely a presumption, but a title, and that not by way of defense, but by way of the establishment affirmatively of a right. This, under the decisions of this court and the general doctrine upon the the subject, we maintain may not be done in a suit to quiet title, upon the condition of facts disclosed in this record and upon the condition of facts asserted by the respondent.

That a plaintiff in ejectment or trespass must recover upon the strength of his own title and not upon the weakness of the defendant's title, will, we assume, not be questioned. That any plaintiff asserting legal ownership to land and endeavoring to secure and adjudicate its title thereto and its possession and right of possession thereto, in whatever form of suit it is done, is affected by the same legal proposition, we maintain is equally well established.

A plaintiff who comes into court asserting that he is the owner of property to which others present claims, and asks to have his title quieted, must, as the very foundation of a decree in his behalf, prove that he does own it, and may succeed only upon the establishment of that title, and can not do so upon the weakness of the defendant's title or the failure of the defendant to allege and affirmatively establish that he has a better right to the premises, title to which is sought to be quieted, than the plaintiff.

White's Mines and Mining Remedies, Sec. 639;
Dick vs. Foraker, 155 U. S., 414;
17 Ency. Pl. & Pr., pp. 300, 301, 350, 761;
Glass vs. Goodrich, 175 Ill., 20;
Winter vs. McMillan, 87 Cal., 256;
Woods vs. Lindsey, 7 Wheat. (U. S.), 158.

The patents to mining claims generally, and this is fully illustrated by the patents to the mining claims in this case (Record, pp. 39, 45, 48, 551, 557; Printed Stipulation and Exhibits, pp. 3-8, 8-12),

embody in the grant of titles and in the exclusions and reservations therefrom, the general doctrine of the mining statutes, that there is secured by the location and conveyed by the patent, the surface of the claim and the ore in such lodes as have their apexes therein, and reserved to the Government, or to locator of apexes outside of their surface lines, the ownership of ore beneath the surface of the patented ground. The presumption, therefore, from the mere ownership of the surface, that the ore beneath it is the property of the owner thereof, either upon the common law presumption, or the presumption that it has its apex within the claim, is but *prima facie* in its nature, and disappears whenever the evidence discloses that the apex of the ore beneath the surface is outside of the surface.

The presumption of ownership of the ore because of the ownership of the surface is not a persistent one, does not interfere with the burden upon the plaintiff to prove the title he asserts when denied, and does not impose upon the defendant, in a bill to quiet title, or in an action of ejectment, the necessity of proving, as against this presumption, its own title to ores which the defendant is mining. Whenever in the progress of the trial it is shown that the apex of the ore body is without the claim, and beyond dispute if it be shown that the apex is in another claim so located as to give it extra-lateral rights, the presumption is annulled and the claim of the plaintiff is defeated, if it rests only upon this presumption. But if the pleadings are such that he has a right to assert any title which he may possess, the burden is upon him, and remains throughout the trial, to show that the apex does not exist in such form or position as to give a right to anyone else to the premises, or that the plaintiff is the owner of the apex. If he fails so to do, then he has not proved his title, and may not succeed upon the failure of the defendant to affirmatively establish one.

In this case the petitioners denied the alleged title and ownership of the respondent to the ore bodies in question, being the *res* in dispute, and then alleged ownership of these ore bodies in themselves by virtue of apex rights, but did not bring a cross-bill to quiet title thereto. The result was that the burden was and remained upon the respondent to prove its title to the ore bodies, which it did not do as a result of the asserted presumption; for it was soon demonstrated that as a matter of fact the apex of the ore bodies was without these claims; that the respondent itself asserted that it existed in claims which had the

ownership of the ore; that the petitioners claimed the mining complained of to be upon veins of which they had the apex.

Much of the conflict, we think, in the cases upon the subject of this presumption and its application, will disappear when the character of the particular case in which the doctrine is announced is considered and the doctrine is limited to that case on its facts. If, however, the cases are irreconcilable, it appears that this court announced the doctrine upon this subject which must control in the present case.

Decisions of Judge Hallett are cited in respondent's brief to support its claim upon this subject. But it will be found that they were not in cases where the facts were as here, nor was the presumption applied to the condition in which this case stood at the termination of the introduction of the evidence or as it stands now. On the contrary, in a later case Judge Hallett explicitly and unmistakably announced a doctrine which is flatly contradictory of respondent's claim.

In Roxana Co. vs. Cone, 100 Fed., 168, as in this case, the plaintiff, while showing that the ore body in question was beneath its surface lines, disclosed that the apex of it was without its claim, whereupon the court held that the plaintiff did not exhibit a case entitling it to protection. The reason was that it appeared that the apex of the ore body was not in the claim beneath which the ore was found, and therefore the actual showing of course made the presumption, which was contrary to the fact, inapplicable. So here, the respondent, by proving or asserting and contending that the apex of these ore bodies is in the Jordan and Mountain Gem claims, and owned by the owners of those claims, makes it impossible that it should by presumption be established that the ownership is in the other four claims.

There is a full discussion of the subject of presumption and burden of proof in Jones vs. The Prospect Mountain Tunnel Co., 21 Nev., 339, in which the authorities are reviewed and sound distinctions laid down. This decision discusses some of the cases cited by respondent, is directly opposed thereto, and bases its conclusions upon a number of decisions by the Federal Courts, including Mining Co. vs. Clark, 42 Fed. Rep., 626; Mining Co. vs. Cheesman, 116 U. S., 533; Reynolds vs. Mining Co., 116 U. S., 687; Iron Silver Mining Co. vs. Mike and Starr Co., 143 U. S., 394. After pointing out that a patent for a mining claim is quite a different thing from a patent for agricultural land since the latter conveys the surface ground and all

that lies beneath it, and the former does not necessarily or always do so, and citing authorities to establish this proposition, it says:

"Doubtless, the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside the exterior lines of the plaintiff's patented ground, it would be presumed to apex inside those lines. Mining Co. vs. Campbell, 17 Colo., 207; 29 Pac., 513; Cheesman vs. Shreve, 37 Fed. Rep., 36. But when evidence is produced tending to show that the ledge apexes outside those lines, this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge; and they must now meet this evidence and overcome it, or they will fail in establishing their title. As the plaintiffs' ownership is denied, the burden of proving it is all along upon them. If the ownership depends upon whether the ledge apexes inside the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title. If they do not own the ledge from which the ore was extracted, it matters not who does own it. Reynolds vs. Mining Co., *supra*. Evidence showing that the ledge apexes outside the plaintiffs' ground is not offered to establish a fact by way of confession and avoidance of the plaintiffs' case, as to which the burden would be upon the defendant, but to show that they never had any case, because they never owned that ledge. The burden of showing ownership being placed by the pleadings upon the plaintiffs, it never shifts to the defendant, except in the limited sense already spoken of. This is a universal rule, applicable to all cases, and one that is supported by both reason and the great weight of authority. The distinction between the two burdens is clearly pointed out in Scott vs. Wood, where it is said: 'The term "burden of proof" is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. * * * The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings; that is to say, with the party who has the affirmative of the issue.' 81 Cal., 398, 400; 22 Pac. Rep., 871."

The learned judge cites, in support of this contention, Heinemann vs. Heard, 62 N. Y., 448, 453; Heilman vs. Lazarus, 90 N. Y., 672, 673; Clark vs. Hills, 67 Tex., 141, 149, and a number of other cases upon the subject, and comments upon and disapproves of Cheesman vs. Hart, 42 Fed., 98, and Bell vs. Skillicorn, 28 Pac., 768.

Reynolds vs. Iron Silver Mining Company was a case in which the owners of a patented placer brought an action to recover part of the vein or lode or mineral deposit within the boundaries of a placer. The defendant below claimed a right to the vein or deposit, in which they were working under lode claims called the Crown Point and Pinnacle; and also alleged that at the time of the survey, entry and patenting of the placer claim, a certain lode called the Pinnacle lode, and a certain lode the name of which was not given, carrying minerals of great value, were known and claimed to exist within the placer, and that in the application for patent this lode was not included, and by the statute and the patent were expressly excluded. The full charge of the court to the jury is set forth, and the court calls attention to some instructions requested by the defendant, which were denied, and especially comments upon the fourth instruction which is as follows: "The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiffs by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiffs can not recover on the weakness of defendant's title." The result of the decision is that the court held the jury could not be instructed to find for the plaintiff save upon the proof of his own title, and against one who asserted apex rights to ore within the boundaries of the patented claim, the owner of that claim was required to establish his ownership, and could not recover upon the lack of title in the apex claimant.

This is directly applicable in principle to the doctrine under investigation. In the case at bar the respondent brought suit against the petitioners, mining ore within veins lying under its surface and claiming a right so to do, and now says it is only necessary for it, in order to recover, to prove that it has a patent to the surface, and that unless thereupon the petitioners come with a perfect apex title, it may have decreed to it an ownership which in fact it does not have, solely by virtue of an exploded presumption. That character of contention was virtually what was embodied in the instructions given by the trial court to the jury, and which were found erroneous by this court. There is much parallelism in substance and upon principle between that case and this.

Lindley on Mines, Section 866, cited by respondent (October Brief, p. 28), commenting upon 21 Nev., 329, *supra*, says of the doctrine it announces and with cogent reasoning and citation of authori-

ties sustains, that it "seems to be supported, to some extent at least, by the decision of the Supreme Court of the United States in Reynolds vs. Iron Silver Mining Company, referred to in the opinion of Judge Bigelow, and also by decisions of Judge Knowles and Judge Hallett, denying injunctions where complainant has the surface overlying the ore bodies but not the apex of the vein; but there are a number of well considered cases wherein the doctrine is denied." The decisions of Judges Knowles and Hallett thus referred to are, Mining Company, Limited, vs. Clark, 42 Fed., 626; Roxana G. M. & T. Co. vs. Cone, 100 Fed., 168. The learned author scarely states in its fullness the support given Judge Bigelow's conclusions and argument by this court in Reynolds vs. Iron Silver Mining Company, *supra*, for the last case, which, of course, controls and determines this question here, is in principle applicable to this case, and sustains our claim, Judge Bigelow's opinion, and renders a general discussion of the authorities unnecessary. Whatever conflict there may be among the courts upon this subject and whatever state courts may have held, being at liberty to adopt other practices, and in some states by statutes required so to do, we are not concerned or interested in them, because for the Federal Courts and upon this question this court settles the practice. The distinction, however, pointed out by Judge Bigelow and sustained by the authorities cited by him for that purpose, excludes the case at bar from the principles determined by cases bearing in reality upon this question cited by respondent, in which the presumption invoked has been applied unless perhaps it may be the two cases adversely commented upon by Judge Bigelow.

VIII.

KEMPTON BEDDED VEIN EXTRA-LATERAL RIGHTS.

If the Jordan and Mountain Gem apex claim to the ore is eliminated from this case, either by the position of respondent that it is not involved nor relied upon, or by the demonstration of the non-existence of the broad lode, the case on respondent's assertions, remains, in certain views of it, to be determined upon the ownership of the ore in dispute by the petitioners as the result of their ownership of the Kempton and Ashland claims. We have presented our contention that

under the present position of the respondent the ownership of the ore by virtue of the ownership of the broad lode apex is eliminated; also that there is no such lode, and therefore could be no rights based upon it; and have sought to refute respondent's now avowed position that it may secure a decree quieting title to the ore in dispute upon the mere presumption of ownership based upon its ownership of the surface of the four claims, and the alleged failure of petitioners to show ownership to this ore. We think we may safely claim that we have maintained these positions, especially in view of the continued assertion by respondent of the existence of the broad lode, and the existence of apex title to the contested ores by virtue thereof, although that title is not so presented as to make it the basis of a decree quieting title to the ores. Under the authorities, including Reynolds vs. The Iron Silver Mining Company, 116 U. S., 687; Jones vs. Prospect Mt. M. Co., 21 Nevada, 339, and other cases cited under Division VII hereof, the disclosure that the petitioners were in possession, by actual working thereon, of the ores in dispute beneath the surface, claiming a title thereto by virtue of Kempton and Ashland apexes, precludes reliance at the close of the case by respondent, by presumption, and imposed upon respondent the necessity of proving an actual title to the ore.

However, where such vast interests are involved as here, and there are so many complications because of the nature of the rights asserted, the changing attitude of the respondent, the peculiar relations of the respondent to a suit in which it asserts one merely presumptive title, and withholds from consideration another alleged real title, we are required, in fairness to the petitioners and the court, to consider, under the law and evidence, respondent's claim that it must succeed unless petitioners established their apex rights as alleged in the affirmative portion of their answer.

In the original brief we outlined the apex claims of petitioners, and referred to the evidence and the law sustaining them. We now present our contentions against the assertions of respondent upon this subject, upon an exhibition of the real claims in the case, with their boundaries presented by correct maps upon the evidence of the witnesses relating to Kempton and Ashland fissures, their positions, extent, and character.

First, we shall consider the Kempton claim, and Kempton bedded vein and its apex or extra-lateral rights.

The Kempton Apex Map shows the agreed boundaries of the Kempton claim, the relations of those boundaries to the true boundaries of the Northern Light, Grizzly, Jordan Extension and Fairview claims, the position of the ore bodies in dispute, the course, position, and extent, as proved by petitioners, of the Kempton bedded vein apex, the definition of its extra-lateral rights determined by extending in its own direction the southwesterly end line of the Kempton across boundaries of respondent's four claims, and drawing parallel thereto, as indicated by heavy dotted line, the position of a plane parallel to the end lines of the Kempton claim through the termination in its northeasterly course of the Kempton apex. This map reproduces features of other maps called to the attention of the Court, eliminating lines and workings which do not aid in comprehending the matter now presented. It brings out strongly the lines of the Kempton claim, which are indistinct and difficult to trace because of the numerous lines exhibited upon the maps of respondent and petitioner covering this territory. The apex is outlined as petitioners assert it to exist, as the workings under ground, the disclosures at the surface, and the positive testimony of numerous witnesses thoroughly familiar with the workings and the vein, and as respondent's admissions necessarily establish it. This apex crosses the southwesterly end line of the claim, and follows in its northwesterly course the direction of the apex in substantial parallelism with the opposite side lines of the claim, until it reaches a cross-fissure, the position of which, as opened up by workings thereon, is outlined by the heavy line crossing the termination of the Kempton apex. The ore bodies in dispute lie between the parallel lines projected through the southwesterly end line of the Kempton and the northeasterly termination of the apex of the Kempton against the transverse fissure shown upon the map as extending crosswise of the Kempton claim. With this as we demonstrate it the correct position of the apex of the Kempton bedded vein with reference to the boundary lines of that claim, all discussion of the doctrine of Catron vs. Old. 23 Colorado, 433, the soundness or unsoundness of that decision and the argument and contention as to the law with reference to the effect upon extra-lateral rights of the apex of a vein passing into a claim through one portion of a broken line constituting a part of a side line, and then passing out through another portion of the same side line, is

eliminated from the case, and a review of the authorities and discussion in respondent's October brief, pages 134-141, is made unnecessary.

The position thus presented of the extent and position of the Kempton bedded vein apex determines absolutely the existence of extra-lateral rights to the extent this vein goes upon its dip between the lines defining these extra-lateral rights across the claims of respondent, and includes all the ore bodies in dispute. The remaining questions would be:

Does the Kempton vein upon its dip extend to and include these ore bodies? and———

Does the apex exist as we have shown it?

In the original brief, pages 14-21, we made reference to the witnesses and their testimony, and referred to the printed record where it could be found, upon which we relied as proving that the east end or termination of the apex of the Kempton bedded vein was as indicated upon this map, and that this apex extended from this place exposed by surface workings for more than five hundred feet, and crossed the southwesterly end line of the claim.

The reference at page 16 to post No. 1 of the Mountain Gem claim, was to the erroneous map of that claim which had been copied on to Exhibit 21 of petitioners, with its incorrectly numbered corners, for the purpose only of designating upon the map the point indicating this position. We call attention to this fact now to prevent any misunderstanding resulting from it.

Respondent, having admitted, as we maintain, such facts concerning the extent and continuity of the ore within the Kempton bedded vein as to put beyond dispute its existence as an individual lode capable of location and possessing all the attributes necessary to the assertion of extra-lateral rights, upon its strike and dip as that strike and dip were defined by the witnesses for petitioners, challenges extra-lateral rights upon this vein upon three grounds, as we are now advised:

(1) That the vein and ore, upon its dip and descent into the earth, does not go deep enough to reach and be a part of the ore bodies in dispute.

(2) That on its course or strike the outcrop crosses lines 2-3 and 4-5, which are parts of the southerly side line of said claim 2-3-4-5, and which portions of said side line, it is urged, are thereby converted into end lines of the Kempton claim, diverging from each other so

that no parallelism exists; and therefore, it is contended, all extra-lateral rights by virtue of the possession of the apex within the Kempton claim are destroyed, and no right, therefore, exists to the ore within that vein upon its dip beneath the boundaries of the respondent's four claims.

(3) That the Kempton bedded claim is not sufficiently individual in its character to be a lode with apex rights.

Position 1 is negatived by the admission of counsel concerning the continuity and extent of the vein; for the witnesses who had testified before that admission was made positively identified this vein as extending upon its dip in ore all the way, and with the extent upon its strike indicated to and including to the lowest level of the mine, being the lowest opening upon the Neptune Tunnel and in the ore bodies in controversy. This admission, which the brief repeats, and the oral argument reaffirmed, ought in good conscience to render any discussion or citation of testimony upon this point unnecessary. We now call the Court's attention, without here reprinting it, to the testimony which had been given by the witnesses for petitioners when this admission was made, and which consists of the testimony of the witnesses Morehouse (Record, pages 171-217), Hannahs (Record, pages 254-270), Beveridge (Record, pages 217-244), W. R. Smith (Record, pages 244-259), Colbath (Record, pages 159-162), and Hazelgrove (Record, pages 270-278); and after the admission was made, to the testimony of E. A. Wall (Record, pages 284-304).

The contention urged in the October brief, that the Kempton vein did not, upon its dip, in continuous ore, reach the lowest workings in the ore in dispute, is in flat contradiction to the testimony of the witnesses whose tracing of the vein upon its dip was conceded in open court by the respondent's counsel, and is an attempt to deny this positive admission. It was because of this admission that in the original brief herein the testimony was not more fully referred to tracing this continuous dip of the Kempton vein into the lowest working in the ore in controversy.

We now consider the second ground upon which extra-lateral rights are denied to the Kempton claim.

There is no substantive evidence in the record, and nothing which can be claimed to support this claim; and the inferences, conjectures, and misinterpretations of the evidence relied upon for that purpose utterly fail to justify it.

Respondent made no effort to have any witness called on its behalf testify that this vein in fact crossed either of the side lines of the claim, or any portion of either side line. By reference to some testimony which in the record is made vague and uncertain by the fact that positions upon the map were pointed to without defining them, the testimony of Beveridge, a witness for the petitioners, is sought to be construed into evidence that the Kempton vein in its course extended beyond the cross-fissure, and did or would cross line 4-5 of the Kempton claim. The witness did not so testify, but had explicitly announced in unequivocal terms, that the Kempton bedded vein terminated at a point on the map marked "Shaft," which was a small shaft with a little tunnel running from the bottom out through the Kempton side lines (Record, page 219), upon the cross-fissure against which, as we have stated, the Kempton vein in its northeasterly course terminated; the testimony of the witness upon this subject being as follows: (Record, page 219.)

"Q. Can you say where it ends?

"A. It ends about this point here within a few feet of this shaft; I do not see any mark.

"Q. At the point marked shaft?

"A. Shaft, small shaft, and a little tunnel running from the bottom of the shaft out through the Kempton side lines. I presume that is correct.

* * * * * * * *

"Q. The point you mark is inside of the lines delineated upon the map.

"A. Yes, sir; inside of the side lines of the Kempton claim."

That to which the witness referred in the evidence culled out of his testimony by respondent in the desperate effort to destroy extra-lateral rights in a vein whose individuality and character as a lode can not be with much countenance resisted, was the course of the cross-fissure and the assumed position of ore bodies at a distance beyond the boundaries of the claim, not a part of the Kempton vein. It did not, according to the understanding of the witness, relate to the persistence of the Kempton vein beyond the shaft at which, upon the cross-fissure, he had testified, the vein ended. The ore bodies to which reference is made, if they in fact existed (and it was but hypothetically presented to the witness that they did, and his answer was but an acceptance of what would follow if the hypothesis existed) were in fact

in a vein belonging to the respondent, parallel in its course to the Kempton vein, and lying south and east therefrom about 75 feet, as the application of a scale of the map will indicate. The Court will bear in mind, in examining the testimony, that the Kempton bedded vein, although upon a fissure, is not to be confused with the Kempton incline fissure, which runs virtually at right angles to the Kempton vein.

It is upon the confused, uncertain, and at points, as the record presents it, virtually unintelligible testimony of Beveridge, upon the conjectural and hypothetical suggestions of counsel for respondent in cross-examination, that there is now based the inference and conjecture that the Kempton vein in its course crossed line 4-5 of the claim. We request a reading of the testimony of Beveridge upon the subject of the position of the Kempton bedded vein, and an attempt to understand the questions put to him, the answers to which are now relied upon as the best explanation and as a perfect refutation of what is sought to be deduced therefrom. However, the Court before whom this case was tried, who saw the witness point to the different places about which he was testifying, who saw the things to which counsel pointed in asking questions, had not only this advantage in ascertaining the fact, but also had the testimony of a number of other witnesses who had traced this vein upon the surface, and whose evidence is in no wise confused, but is clear, distinct, and positive upon this subject. It is to be observed, in considering their testimony, that it was their evidence concerning the continuity and, necessarily, also of the Kempton vein which was accepted as correct by counsel for complainant in his his admission in court. Among these witnesses who trace the Kempton vein in its course to the northeast, and define its termination, are the following:

W. R. Smith (Record, pages 250-251):

"Q. Now I will ask you to refer again to this surface map. I see marked on here 'Old excavations' on apex of Kempton vein. I will ask you if you looked at those excavations and the tracings which are projected upon that map?

"A. Yes, sir.

"Q. On the surface.

"A. Yes, sir.

"Q. What did you find?

"A. I found ore continuous from a point here.

"Q. Give the point?

"A. A point here; there is no mark there. It would be, I consider, fifteen to twenty feet from where this post should be, over in this direction—Number 1 post of the Mountain Gem.

"Q. Fifteen or twenty feet northwest?

"A. I think it would be a little—yes, sir, northwest, that is right—or northeast; northeast, I think.

"Q. Is that northeast up there?

"A. No, down here.

"Q. Fifteen or twenty feet northwest of where?

"A. Northwest of this point.

"Q. To what point?

"A. Post 1 of the Mountain Gem, right about here.

"Q. You saw the ore there?

"A. Yes, sir, I think so. It takes the strata, some of it, like the fissure came through there and butted up against that; went right through the fissure.

"Q. That is, you say the ore butts up against the fissure there?

"A. Yes, sir, right into the fissure at this point here.

"Q. And ends there?

"A. Ends there. There is no ore along here. There is a shaft here on the fissure, but no ore. They cut right into the blue lime, these holes and they can't be seen going by the lime—it is not shown."

Frank C. Morehouse (Record, pages 181-182). After tracing the course of the apex, the witness, at page 182, says:

"Q. What did you observe in the way of ore outcropping along that line?

"A. I observed ore outcropping from station 904 to the air shaft at station 100 to station about 30 feet southerly from the mouth of the Kempton incline station 400. The stripping was shown there and extended over, there was a stripping extending over to a point marked 'Shaft,' 15 feet about, from 10 to 12 feet, from stake 1 of the Mountain Gem northerly; the stripping was in ore, showing a vein, to a point what would be on this map the side line of the Mountain Gem, about 15 feet from the westerly corner post No. 1, from the post marking corner 1 on this map (Ex. 20).

"Q. I will ask you if you discovered where the outcrop of ore ended?

"A. It ended about ten or twelve feet along the side line of the Mountain Gem as shown on this map, ten feet or possibly twelve or fifteen feet westerly from the point marked 1 of the Mountain Gem claim.

"Q. State whether that is inside of the Kempton surface ground as delineated upon this map?

"A. It is.

"Q. How does it end there and how do you know it ends there?

"A. The stripping extends along to that point and the rock is shown beyond and there is no ore. At a point in which the shaft is sunk there is ore standing, the strike of the ore being northerly and southerly, and has been stripped from the shaft down for 20 feet probably, showing ore in fissure shape running northerly and southerly. The tunnel marked 'Tunnel' running into this shaft up near what is called post 1, Mountain Gem, on this map, runs in through limestone and cuts the ore I have described standing vertically, nearly up and down, and running northerly and southerly, and there is no ore shown beyond the point 10, 12 or 15 feet westerly of what is here marked post 1, Mountain Gem. These cuts beyond this tunnel are in limestone.

"Q. Would it be called country rock?

"A. Country, yes, sir."

* * * * * * * *

(Page 183):

"Q. I will ask you how that excavation that you have last described is marked upon the map?

"A. Marked old excavation on apex of Kempton vein.

"Q. I will ask you if that has the appearance of having at some time been mined?

"A. It has.

"Q. In recent times or in old time?

"A. It looks very old.

"Q. In olden times?

"A. It is old, yes.

"Q. How far at the end here is the stripping driven into the country rock, if at all? And what you call the east end of the apex of the Kempton?

"A. There is country rock from that side of this cut running northerly and southerly from that side for only a few feet to the end of the stripping but there is country rock between that side of that cut and the end of the ore, stripping beyond the ore shown in the stripping and is as I have already said, country rock in these cuts; and at this point it intersects the ore standing nearly vertical and running northerly and southerly, and running along the side of that point marked shaft.

"Q. I will ask you whether that appears to be a different fissure or formation from the Kempton?

"A. It is in the same formation, but it is a different ore body or a different vein.

"Q. I will ask you whether there is any evidence of ore of value in that?

"A. Not that I discovered."

Upon the testimony of this witness respondent seeks solace upon the projection of the Kempton apex through the line which the miners call country rock for the distance intervening between the cross-fissure and line 4-5 by its interpretation of a cross-examination of the witness Morehouse at pages 192-193. We do not accept the summary of Morehouse's testimony upon this subject, and much prefer the Court to get its understanding of what Morehouse testified by what he in fact said. At page 192 we find the following testimony by that witness:

"Q. Now where do you find, according to your judgment the easterly limit of this so-called bed vein; fix it definitely?

"A. Well, I could not fix it to an inch.

"Q. Oh, no?

"A. Well, it is approximately 15 feet along the upper side line of the Mountain Gem from what is marked here post 1.

"Q. That is approximately 15 feet west?

"A. Westerly.

"Q. And along the southerly line of the Kempton?

"A. No, sir; inside of the southerly Kempton line.

"Q. How far north of the southerly line approximately?

"A. About the same distance, 15 feet.

"Q. At that point?

"A. Somewheres there.

"Q. That would be the point about where I put my finger?

"A. Yes.

"Q. Do you know who did this work running northerly and southerly just west of post No. 1 Mountain Gem?

"A. No.

"Q. Don't know who did it?

"A. No, sir.

"Q. It is in ore?

"A. It is partly in ore, yes.

"Q. It is in ore clear to its southerly face, isn't it?

"A. There is ore to the southerly face; at the northerly face, yes.

"Q. And that is across the side line of the Kempton, isn't it?

"A. No, sir; when I spoke of southerly, I meant, I was thinking of this way.

"Q. I thought I directed your attention to that?

"A. I did not so understand it; I was looking here.

"Q. How far southerly in that line of work, running northerly and southerly and just west of post No. 1 of Mountain Gem do you have ore or unmistakable vein matter?

"A. Possibly stripped as far down as that cut shows.

"Q. As far as the cut shows?

"A. Possibly the strippings run across that way and show up in the workings here and going downward. This was covered with some debris; that little pit run off that way to probably here went through there; I would not have any doubt there would be some ore running there in that direction.

"Q. That would carry it across the south side line of the Kempton of course, that particular ore?

"A. It went there, yes, sir; I would not swear that it did or did not.

"Q. Now, do I understand you to say that running out in a southeasterly direction from the point marked shaft in the workings that we have just been talking about, out to the point marked elevation 1312, that work is not in the vein?

"A. That working is not in a vein or in ore but in this material limestone with oxidized iron for a distance of about five or six feet from the shaft going towards the mouth of that tunnel.

"Q. And what is it in the face?

"A. In the face of the tunnel?

"Q. Yes.

"A. The face of the tunnel is in the shaft.

"Q. I mean the mouth of the tunnel?

"A. The mouth of the tunnel is in limestone and limestone up within five or six feet of it.

"Q. What kind of limestone; unaltered limestone?

"A. Well, I think it is straight limestone."

It is urged that from this testimony, and from the alleged absence of doubt from the mind of the witness, indicated by his answer, the apex of the vein, by which we understand the brief to mean the apex of the Kempton bedded vein, is carried across the south side line of the Kempton. We challenge the correctness of and the existence of any foundation whatever for this conclusion. The fissure which the witness expressly testified was not the Kempton fissure, and which ran northerly and southerly, and which extended across the south side line of the Kempton claim, was the north and south fissure against the northeasterly wall of which the Kempton apex terminated.

Heber McNeill (Record, pages 279-280). The witness says:

"Q. Now, Mr. McNeill, I wish you would, if you can, indicate

upon the map, if it be a fact, the extent in length of the outcrop of the fissure in Kempton ground so far as you know?

"A. The fissure in Kempton ground?

"Q. The ore—the ore vein?

"A. The bed vein?

"Q. The bed vein, yes?

"A. Well, I came here right out of to a point about here.

"Q. When you say 'here' designate it by some mark.

"A. Well, it is this point here. What do you call that place?

"Q. 1342 is the mark there.

"A. Well, it is about fifteen or twenty feet west of this Gem post marked 'No. 1.' That is where I think we found that the bed vein stopped.

"Q. How does it stop—what against?

"It goes up against what we miners call limestone or country rock at this point here, about fifteen or twenty feet west or probably a little more from post No. 1 of the Gem.

"Q. I will ask you if there is any fissure in the rock across there?

"A. Well, it looks something similar to a fissure. It looks like a man had a handful of mud and throwed it up again the face of it; it is kind of spattered. You can't tell; it is something similar to the fissure.

"Q. But you say it terminates against the country rock there?

"Yes, sir, at that point.

"Q. About fifteen or twenty feet from————

"A. Fifteen or twenty feet, maybe a little more, from post No. 1 west of the Mountain Gem."

In view of the fact that when respondent established the outcrop of the Kempton vein within its surface boundaries running in a course substantially parallel to its side lines, a presumption arose in its behalf that it so continued for apex purposes as to lie wholly within the claim, and in such relations to the surface boundaries as to confer extra-lateral rights, and that it was not necessary that it should prove the existence of the apex from end line to end line, but merely to show its existence within the claim, and that thereupon, if the respondent claimed that the relations of the apex to the surface boundaries defeated the extra-lateral right, the burden was upon it to so prove, we have an utter failure by respondent to sustain this burden, and have added to the presumption the law affords upon this subject clear, positive, distinct, and unmistakable evidence which fully established the northeastern terminus of the apex; and as against this, for the important pur-

pose of destroying the extra-lateral rights of the Kempton bedded vein, of shifting the burden imposed by the law, and destroying the presumptions it threw around the rights of the Kempton vein, there are presented the cross-examination of Beveridge, such as the record discloses it to be, and the inferences undertaken to be derived therefrom. The presumptions upon this subject are well defined and rebutted.

Wakeman vs. Norton, 24 Colorado, 192.
Armstrong vs. Lower, 6 Colorado, 398, 581.
Carson City G. & S. M. Co. vs. North Star M. Co., 73 Federal, 597; 83 Federal, 658.
Iron Silver Company vs. Campbell, 17 Colorado, 272.
Lindley on Mines, 2d Ed., Section 615.

The evidence to which we have referred, the presumptions we have invoked, the character of the basis of respondent's theory, reinforced by the presumptions attaching to the judgment of the trial judge who heard the evidence, we submit, clarify the atmosphere surrounding this subject, and make it impossible to conjecture the physical apex which ends at the cross-fissure by pure mental projection and unsupported theory across line 4-5.

The fertile imagination of respondent is prolific in the production of veins having any course which might tend to affect the extra-lateral rights of the Kempton vein. When Beveridge's testimony is presented, it is supposed to indicate the continuance of the Kempton vein in its course across the fissure until it crosses line 4-5. When Morehouse's testimony is presented, it is urged that it shows the Kempton bedded vein crossing the southerly side line of the claim along the course of the stripping which is a part of and in line with the north and south fissure. The fact is that the vein does not extend across the fissure, and that the vein with a north and south course, as Mr. Morehouse clearly states, is another vein, and not the Kempton vein; and it is this other vein, this transverse fissure which in its northerly and southerly course projected, and if it should so extend, and be a vein, crosses the southerly side line of the Kempton claim. This cross-fissure is not, so far as it is a vein at all, a part of the Kempton vein.

It is as distinct therefrom as is the Ashland fissure vein, the Galena fissure vein, the Sampson fissure, or any of the other fissures parallel to it which intersect the limestone.

Upon a foundation so unsubstantial does the respondent seek to built an argument which is to take the place of testimony, and refute the positive evidence of unimpeached, intelligent, and informed witnesses.

We have dwelt thus at length and quoted thus extensively from the evidence because it will be seen from an examination of the whole case that we have here the last hope of the respondent in what we feel justified in calling desperate efforts to destroy the Kempton vein, mined upon and carried beyond its side lines years before either the respondent or any of its predecessors dreamed of a broad lode vein, or acquired title to the four claims upon which they now rely, as exhibited in part by the testimony of respondent's witness and engineer, J. Fewson Smith, (Record, page 84-5, 54, 65). The title to the four surface claims as appears from the record referred to was obtained in 1899, whereas the Kempton and Ashland veins had been developed on their dips many years before. Not only are we confronted with two crossings by the same vein at the northeasterly part of the Kempton apex, but also it is asserted that upon its course it crosses line 2-3.

An examination of the contour-lines upon respondent's map, Exhibit T, showing the relative elevations of the surface through which they are drawn, the large photograph exhibited at the oral hearing and as well the testimony of the witnesses, discloses that about the center in its course of the Kempton vein is the highest portion thereof, and that the hill then slopes away to the northeast and also to the southwest, the effect of which is to cause the apex of the Kempton bedded vein, which has substantially the strike of the limestone, to go to the north at each end, fixing the position of the limestone outcrop as shown upon the Kempton Apex Map, and that the Kempton boundaries conform to this change in position of the apex in substantially the same manner so that the several broken lines constituting the opposite side lines of the claim conform in direction substantially with the course of the apex; that at the southwesterly end, where the apex does not come to the surface, and where the surface and the bed-rock, or rock in place beneath the wash, slopes to the southwest, the apex has substantially the course of the true strike of the limestone, as indicated

upon respondent's Exhibit T at this place, and is parallel to lines 2-3 and 1-8, while as to the workings which demonstrate in conformity with what the law would presume the extension of the apex across the southwesterly end line 1-2, the proof is no less positive, absolute, and incontrovertible than that which is given by the witnesses of the open trenchings and strippings along the apex at the surface which lie open to all observers. Instead of the apex continuing in a straight line across line 2-3, as respondent asserts, it conforms with the bedding planes of the limestone, deflects to the north as the physical conformation of the top of the rock compels it to do, and passes through the end line substantially at the center.

Respondent bases its inferences, conjectures, and maps to the effect that line 2-3 is crossed by the apex upon the following considerations:

That W. R. Smith had testified that he found ore at a point fifteen or twenty feet from Post 1 of the Gem, at which point the ore butts up against a fissure, this being the northeasterly terminus of the Kempton apex, cutting through the lime 400 feet westerly, which we understand to mean that respondent takes the testimony of Smith to say that from the northeasterly terminus, as we have shown it, he found ore continuously 400 feet westerly. The testimony of Smith upon his tracing of the apex is found in part at pages 18-19 of our original brief. Concerning the tracing to the west, the witness said:

"Q. How far out this way did you trace it to the west?
"A. Oh, perhaps four or five hundred feet—four hundred feet from the number one (1) post here, from fifteen to twenty feet from the Mountain View (meaning post one of Mountain Gem, as given on the map) westerly. (Record, pages 250-251).

That Hannahs (Record, page 261) states he traced the Kempton vein at the surface from the point near Post 1 of the Gem westerly to the end of the stripping in continuous ore. It appears from the testimony of this witness that he traced at the surface the apex of the Kempton vein from the northeasterly terminus to which we have referred continuously in ore to Point 904 on Exhibit 20, which was the westerly termination of the surface stripping, but not the westerly termination of the vein, the course of which is from that point westerly indicated by levels driven on the strike of the vein beneath the

surface. McNeill's testimony is referred to at pages 279-280, to the effect that the outcrop of the bed vein begins where we claim it; and this is the only reference to his testimony. Morehouse's testimony is referred to at pages 215-216, and a quotation made therefrom to the effect that he could not say that the vein stopped in its westerly course at Station 904; and it is said that Mr. Beveridge, on cross-examination, says that at Station 904 there is ore at the extreme west end of the tracing, and nothing to show that the western extremity has been reached. From this condition—that is to say, from the fact that the course of the vein is what the witnesses have outlined and we have shown, and the surface strippings stoping at Station 904, which it is asserted is within a distance of 90 feet of what is called another side line of the Kempton line 2-3, pursuing a course which, if continued, would carry it across the last-mentioned side line—it is argued that the vein, if it follow this course at the apex, must cross line 2-3. And the witness Beveridge, upon the assumptions and hypotheses concerning the bedded veins and continuity of ore put by counsel, it is admitted most adroitly, gave answers which may be urged with some degree of plausibility to furnish a pretext of this contention. Let it be conceded that this witness, in this confused and uncertain testimony, has said something upon which an argument may be hung; and then turn to the undisputed facts in the case to see what they show with reference to this contention.

At page 133 of the October brief respondent says:

"It is morally certain, therefore, that the so-called bed vein of petitioners has crossed the other side line of the Kempton. Either that, or we must be asked to believe that there are two bed veins, one terminating somewhere westerly of Station 904, and another taken up in the stoping at Station 703."

Turning to the reduced copy of Exhibit 21 found at the back of petitioners' original brief, it will be found that beginning near Post 6 of the Ashland claim, Station 100, there is an air shaft, and that from this opening at the surface, by the workings indicated, the Kempton vein is followed upon its dip down to the Turnsheet level, and by means of the workings there indicated upon stope the ore is carried up to the west drift, at the westerly end of which a raise is indicated, all of which is on continuous ore, showing the dip and

strike of the Kempton bedded vein. By this means underground the Kempton bedded vein with its normal dip and strike is shown through the length of the west drift and up the raise to the top thereof. This is a tracing of the Kempton vein in continuous ore which had been made by a number of petitioners' witnesses before counsel for respondent admitted its correctness. About this there is no dispute in the testimony. This carries the vein upon its strike westerly the distance which lies between the air-shaft and the raise, which being scaled is found to be 240 feet, and is 180 feet west of Station 904, and within 60 feet of line 1-2 of the Kempton claim, being the westerly end line of that claim, and 18 feet north of line 1-8 of the Kempton claim, being a portion of the northerly side line, and within about 135 feet of the surface in a vertical line, and carrying the course of the incline to the surface upon its dip a distance of 110 feet, which would bring the vein upon its dip to the surface at a point 125 feet north of the south side line of the claim. The ore at the top of the upraise from the west drift to which we have referred, as shown by the contour maps, is 78 feet higher than the stope south of the south side line of the Kempton claim to which respondent's counsel called the attention of the witness Beveridge, and upon hypotheses suggested that it was upon a bedded vein, and is 280 feet southerly horizontal measurement, from the Kempton bedded vein at the top of the raise from the west drift; and if a line be drawn from this ore body near Point 703 to the top of the raise, the distance is, as called upon the map, 304 feet. This is illustrated by cross-section C C on the line C C drawn across the course of the lode through the stope near Point 703, the top of the upraise at the westerly end of the west drift, the west end of the lower west drift from the Kempton tunnel, Points 806 and 877 on Exhibit 21, the last-named points being on respondent's United States tunnel No. 1, west, near the westerly ends thereof. This cross-section is one constructed from the workings testified to by the witnesses and exhibited upon the maps of respondent and petitioners. As shown by the cross-section, there is a tunnel, Ashland No. 2, which runs from the stope in question at Point 703, following the Ashland fissure across the limestone a distance of some 500 feet to the Turnsheen level, through limestone upon either side, until Point 713 is reached, and encountering the Kempton vein at this distance of 500 feet, where it is found with its normal dip extending

up to the west drift and to the top of the raise therefrom through the workings which have been referred to and described by the witnesses, and to which we have called attention, tracing the strike and dip of the Kempton vein from the air-shaft to the top of the drift from the west raise. So that there was possible an ocular inspection of the physical intervention between the ore body at 703 and the Kempton vein, and a visible refutation of the conjecture.

So, against the moral certainty inferred by respondent that the vein crosses line 2-3 upon its strike, without workings or tracings to prove this fact, we present a thoroughly proved and definitely admitted position of the Kempton vein upon dip, strike, and course to the west, which makes the proposition a physical impossibility. No explanation can make it conceivable, in view of the workings known to all the witnesses for respondent and petitioners who testified in this case, that the vein which is traced to Point 904, which was traced through the Dunstone air-shaft down the inclines to and then out and through the levels continuously in unbroken ore and up to the top of the upraise to which we have referred, could upon its strike be the same vein the ore in which was stoped near Point 703. Hundreds of feet, as we have shown, of limestone lie between them. They are at different elevations as well as far apart in their strike. Mr. Palmer, a witness for the respondent, and a witness of adroitness and experience, gave it as his opinion that the stope near 703 was ore which had broken out from the fissure—that is to say, from the Ashland fissure. This ore in these stopes, it will be observed, was at the line of contact between the underlying quartzite and the limestone, and at the point where the Ashland fissure crossed this contact, and had an unmistakable physical connection with the Ashland fissure ore. In order that there should be identity, which is demonstrated to be impossible, between the Kempton bedded vein apex and this ore body, it would be necessary for the apex to turn in its course, cut across instead of following along with the limestone, and cut through more than 150 feet of limestone between 904 and 703. It is significant that with reference to a question now made so important, and upon which virtually, as it will appear, respondent's case now rests, as to the Kempton vein no witness for the respondent was asked to testify or hazard an opinion in support of what is now urged upon the supposed concessions of Mr. Beveridge. Nor was any witness other than Mr.

Beveridge interrogated upon this subject. Had there been any pronounced effort in this direction, it would have attracted the attention of counsel for the petitioners, and at once attention would have been drawn to the physical features we have here pointed out which made it impossible.

On Exhibit C C the dotted red line from stope at Point 703 indicates the direction which would be taken by the walls of the stope if extended down in the course with the dip there shown, which is along the contact between the quartzite and the limestone. The dotted red line shown to run through No. 1 west drift, U. S. Tunnel No. 1, near Point 877, through west drift, Neptune Tunnel, Turnsheet level, Ashland Tunnel No. 1, west drift, and raise, is dotted to show its dip and course as defined by the workings in the ground down to the west drift Neptune Tunnel, and from that point to where it is again encountered in No. 1 west drift U. S. Tunnel No. 1, it is projected according to its dip.

An elaborate discussion is indulged in in the October brief for the purpose of producing the impression that the form and the relation to the transverse fissures of the Kempton bedded vein, as the evidence of the witnesses of petitioners describe its situation in the ground, its relations to the transverse fissures and to the Ashland vein, makes it impossible to define it with precision, to accept it as a lode within the contemplation of the law, and therefore as incapable of possessing apex rights under the Federal statute.

It is difficult to discuss seriously this elaborate presentation, when it is remembered that in the practical mining upon this lode, which is traced in the evidence back to 1873, and establishes that the owners of the vein had no difficulty in finding an apex from which valuable ore was extensively mined at the very surface of the ground and in following it between walls well defined upon its dip into the earth, so that as early as 1874 it had passed beyond the northerly side-line of the claim and has been explored and stoped upon to a depth of 400 feet beneath the surface and traced upon its strike within its walls for a distance of about 600 feet. There has never been any character of difficulty in finding and following those features which are pre-eminently declared by the courts to be the grant of the Government, the lodes to which the statute refers when it authorizes the owner of a location to follow them upon their dip wheresoever they may go upon their descent into the earth.

There is continuous ore in strike and dip which it is not simply conjectured may be followed, but which has been actually followed. The fact that in its dip and strike it is brought into contact and in places into union or combination with the Ashland fissure vein does not at all affect the proposition. So frequent is this occurrence, without anywise casting doubt upon the existenece of a lode, that when the Act of 1872 was adopted, it especially provided for all such occurrences, whether the veins crossed or united after coming together. When, by what processes of nature, through what other openings, if any, in the earth's crust there came the solutions or minerals which formed the ore bodies in the Kempton bedded vein fissure, may be the subject of interesting speculation, may aid the miner in determining where to seek for ore and aid in ascertaining relative ages of different intersecting fissures, but has no legal significance. Whether the ore in the Kempton bedded vein came up through the cross fissures and thence flowed into the cavity or opening where the Kempton lode is now found, or whether the ore bodies came up through the Kempton fissure and thence found its way into the cross-fissures where they intersected this lode, or whether it came into all of them at the same time, can not aid us in determining whether the location secured the ownership of what is unmistakably a lode of valuable ores, having extent upon its strike and dip which, if the cross-fissures did not now exist would readily be conceded to give it every quality, physical and legal, necessary to the establishment of perfect extra-lateral rights.

If the ore occurrences extending from the cross-fissure in the Kempton claim westerly through the end-line of that claim is not a lode within the meaning of the law, then what may it be? It contains ore. It has boundaries which have been ascertained in the extraction of that ore. It has been mined upon for several hundred feet in length; it has extensive width, and these qualities make a lode, constitute a deposit of mineral in a fissure in the earth's crust in rock in place in the mountain. The fact that the Ashland fissure intersects it, or that ore in the Ashland fissure or any other of the cross-fissures mentioned was deposited at the same time as the ore in the Kempton vein, does not raise a doubt as to the existence as a legal lode of either of these veins. A question for the solution of which the statute provides may arise as to which of these lodes upon their intersection shall take the ore in the intersection, and which shall have only a right-of-way through this intersection.

The crossing of lodes is a well-recognized feature of mining districts, and for years, in Colorado especially, it was held that notwithstanding the intimate relations existing between them as a result of their crossing, they were so legally separated that a location upon one did not include the other to the extent its apex was within the first located claim's boundaries. This was the so-called cross lode doctrine.

Calhoun Mining Co. vs. Ajax Mining Co., 182 U. S. 499.

In order to have a clear conception of what is really meant by respondent's argument upon this subject, which we shall not attempt to summarize or characterize, let inquiry be made as to what is the situation of the Kempton claim with reference to the Kempton bedded vein where it is not reached in its course upon its strike or in its descent upon its dip, or in its conjunction with the Ashland fissure vein. Starting at its northeasterly termination at the country rock wall of the small cross-fissure and going thence westerly, what is there to raise a suspicion that the ore mined from the large openings disclosed upon the map in 1873 and 1874 and in the succeeding years was not an ore body or lode? Take the intersection of this vein by the tunnels run cross-cutting it at a depth of 400 feet below the surface, with its ore body and walls visible to the eye, responsive in yielding valuable ore to the operations of the miner, and it is impossible that the most hypercritical examination of this ore body shall find it deficient in any feature of a lode. Apply to it the definition of a lode so often given by Judge Hallet in his charges to juries, examined and approved—as we pointed out in our original brief—by this Court, and nothing required by the law is wanting.

Take, then, the ore body upon its descent into the earth in which it has, of course, the same physical characteristics which it exhibits at and near the surface, and the like statement is of course necessarily justified.

If it be true that witnesses, as claimed by respondent, could not always tell when they had passed out of an ore body formed at the junction or intersection of the Ashland fissure vein and the Kempton bedded vein, they never had any difficulty in following down upon the dip of each of the two veins upon or into the ore body at this junction or intersection and then mining it to its legal limits.

The criticism of Colonel Wall's evidence upon the relations of the ore body made prominent in respondent's brief and the subject of comment by the Circuit Court of Appeals, will be found upon an examination of the evidence itself in the Record, not to justify the discussion of the criticism.

The defendants in this case, owners of the Kempton claim and of the Ashland claim, had each given leases to Colonel Wall, so that he represented both claims and found himself mining upon an ore body to which, in ignorance of the relations of the other claim thereto, it would seem to be plain belonged to the vein mined upon. The legal question as to which of the two claims owned ore bodies where the lodes came together would depend upon the relative ages of these claims applied to the physical features under the statutes upon that subject, and the decision of the courts interpreting them. Colonel Wall, as the lessee of both parties, did not feel warranted in undertaking to pass upon the rights between themselves as to the ore body in question of the Kempton and Ashland owners. It was not because there was any doubt about the ore bodies being within a lode, but it was as to the legal effect upon the respective titles or claims thereto of the owners of the Ashland and Kempton as to parts of the ore bodies only that he declined to give a legal opinion, but did not decline to state the physical facts, but abundantly testified as to the formation, presence of the ore bodies, their relations to the respective Ashland and Kempton lodes, clearly, logically and convincingly (Record, pp. 284, *et seq*).

Criticism is indulged in concerning the time when Colonel Wall discovered the relations of the Ashland vein and the Kempton and the setting up of the defense upon that subject. No relief seems to be predicated upon this criticism, nor could there be, since the question of amendment was determined by the Circuit Court, and its action in that behalf was not a basis for reversing the decree. The substantive question is, did the relation exist between these lodes which is alleged? The date when it was discovered by a particular witness or party is of course immaterial. In the amended answer there is a full explanation given of the reasons why the pleadings were amended to cover this situation which is legally sufficient and the correctness of which as a matter of fact is by no evidence impugned.

Whether any particular portion of the ore body in question belonged to the Ashland or Kempton claim was and is an immaterial question in this case, since the ownership by either, and the owners of both claims are defendants herein, annihilates any pretense of ownership thereto by the respondent because of its ownership of the four claims upon the title to which it now alone relies.

It is a logical and legal impossibility, we contend, to concede what was admitted, what was put beyond dispute in this case by the defendant at the trial, in its October brief and by counsel at the oral argument, without making devoid even of plausibility respondent's suggestions, conjectures, criticisms and contentions upon this feature of the case. Judge Hallett's charge to the jury in Hyman vs. Wheeler, quoted at page 139-140 of the original brief, is here peculiarly pertinent:

"It is apparent, however, that upon any issue touching the existence of a lode or vein in a place designated, a question whether it has one characteristic or another is a part only of the main question, and in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes immaterial. To illustrate that matter, it may be said that with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be, and it is not at all necessary to decide any question of fissures, contacts, selvedges, slickensides or other marks of distinction in order to establish its character."

Other statements in that charge are peculiarly applicable to this investigation. While there is much said in the brief of respondent about the cross-fissures and about the origin of ore bodies, about nature's processes in the deposition of the ore and the time when, in the countless eons of geological conjecture, these operations were carried on, we are prosaic enough to be content with what was found in the earth when the Kempton and Ashland claims were located by the miners, and not to catechise nature too severely as to the time when, and the instrumentalities by which, the ore that may be fingered by the most doubting Thomas came into its actual position.

At least twelve or fifteen years before Mr. Holden's active brain conceived and revealed his idea of converting a limestone stratum into a lode and to correct the deficiencies of nature's dealings with it in the

matter of ore deposition, Colbath, McNeill and others, with pick and shovel, fell upon the ore body in question and detected that it possessed, not in theory and conjecture, or in what might be expected but was never found, ore of value which they could and did mine, and without a knowledge of its relations far underground with other ore bodies likewise found and mined upon by others. How long and how wide and extending, how deep into the earth must an ore deposit be before it is entitled to be called a lode? Is 500 feet in length and 400 or 500 feet upon the dip; is a width extending from the mere fissure to a hundred feet, sufficient for the purpose? If so, it is all within what we have called the Kempton bedded vein. The ore bodies of this vein are as well defined by the country rock surrounding it as are the ore bodies in the Galena vein cutting across the limestone, which Mr. Holden testified the respondent or its predescessors had mined upon for 5,000 feet along the course of the lode.

Assume that in its northeasterly course the Kempton ore body had extended far enough to be intersected upon strike and dip by the Galena fissure parallel with and possessing many of the qualities of the Ashland fissure, would this fact make something other than a lode of the unmistakable and well-defined rich and extensive ore body reaching from the Ashland fissure to the Galena fissure in its strike, and having intersections in large ore bodies with the Galena upon its dip? Here we would have a greater length upon the strike than the statute permits to be included in one location. The miner would be able to start with the lode upon the surface near the Ashland fissure and go for more than 1500 feet upon its strike, and if he went no further, would seemingly be warranted in locating this as a lode. Having done so and mined upon it for some thirty years, he would, if such claims as respondent now invokes are recognized by the courts, be rudely awakened to the fact that he did not have a lode at all; that the crossing of it by another vein, differing from it, of course, in strike and materially in dip, took from it the ownership of the ore found in it, not because it belonged to the crossing vein, but because this crossing robbed it of its character as a lode. If this form of occurrence is a lode when 1500 feet in length, how short must it be before it loses these qualities? The doctrine of respondent would nullify express provisions of the Act of May 10, 1872, which anticipated just such occurrences as are here found and made sufficient provision for

them. It would virtually prevent the acquisition of important extra-lateral rights upon a lode in districts where there are systems of veins crossing each other, and as is usually the case under these circumstances making, as the miners phrase it, larger ore bodies at their crossings. The more this contention is examined the longer and more carefully the real thing under consideration, the matter of the Kempton lode is studied, in the light of its history and the mining operations upon it; the more pronounced and absolute must be the opinion that this contention is the child of ingenuity and necessity.

We fail to perceive the pertinency of the quotation at pages 157-158 of the October brief from pages 149-153 of petitioner's original brief. Counsel seems not to perceive the meaning of and physical conditions dealt with by the extract made from petitioner's brief. The fallacy of the theory which is the only basis for the broad lode contention, since it terminated the lode qualities of the same fissure and the ores within it in the limestone, about which it made no question when they were in the quartzite, was the subject of review. It may not in fairness be said that when the brief referred to the ore bodies which were between the walls and in the walls by replacement, so as to be the same ore body and a part of the cross-fissure vein, that anything was said which antagonizes the proposition that where an ore body of defined width and boundaries upon strike and dip extends from one cross-fissure to another, so that it has individuality, has clear definition, and this occurs for hundreds of feet in length and upon the dip of the ore body, this is a lode, or that it loses this character because the solutions from which it was deposited found their way up to the situs of the ore body through openings made by the cross-fissures.

It is difficult to present by drawings upon a plane surface the relations of two intersecting veins which are not vertical, but if a sheet of paper shall be placed with a strike conformable to that of the Kempton bedded vein apex and a given dip of 30 to 40 degrees from the horizontal, and another sheet of paper shall be placed in the relation thereto established by giving it a course identical with the strike of the Ashland fissure, and a dip of some 70 degrees from the horizontal, the relations of these two lodes and how they came together will be seen. Then it will appear that an ore body formed at the junction of these two lodes will give evidence of its connection with each, and while by mere physical examination or without that closer

MAPS

TOO

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examination which Colonel Wall described it may not be easy to say from its appearance without finding its walls and going into the main course and body of the respective lodes to which this particular ore belongs or is to be attributed, it can be done and the method of doing it is pointed out in the evidence.

The evidence in this case with reference to the connections between the Kempton bedded vein and the Ashland fissure vein define each so that, by extending the walls of each across the ore bodies at their junction, we define the intersection by one of the other, and thereby determine upon their relative priorities what ore goes to the older and what right of crossing exists in the younger.

The suggested difficulty assumed to exist, but which we think the evidence explodes upon this subject, with reference to these two contentions, is one which necessarily exists in all cases of the crossing of lodes, whether the ore came up in one or the other of the cross-fissures.

IX.

ASHLAND FISSURE VEIN APEX, ITS POSITION, AND THE EXTRA-LATERAL RIGHTS BELONGING THERETO.

The Ashland Apex map, as we shall designate it (page 67 of this brief), shows the boundaries of the Ashland claim according to its true position upon the ground and its true relation to the Jordan, Northern Light, Grizzly and Fairview claims, and the true position of the boundaries of those claims; also the true position of the Jordan and Galena claims with reference thereto; the position of the apex of the Ashland vein, in hatched lines, so far as its existence is necessary to cover the ore bodies in dispute, with dotted lines indicating its course on through the northerly end line of that claim; the ore bodies which are claimed to be controlled by the Ashland apex; outlines of some of the underground workings, which define the extent of development of the ore bodies in dispute, and are placed upon the map to aid in indicating the position of these ore bodies; a dotted line drawn through the southerly end line of the Ashland, parallel to which a line drawn through the apex at point 910 would include all the ore bodies upon the Ashland vein in dispute in this litigation.

This map is a reproduction in part of other maps in evidence, the patents, and patent plats and surveys of the claims exhibited upon it, and shows, by an elimination of many lines and workings unnecessary for this presentation, the relation of the Ashland claim and fissure to this litigation.

This map shows the apex of the Ashland fissure entering the Ashland claim through the southerly end line and passing to the north through points 906, 907, 908, 909 and 910, which is as far as it is necessary to trace it in order to establish the Ashland apex rights to the disputed ore, and thence indicated by dotted lines in its course on through the northerly end line of the claim.

Respondent concedes the existence of the apex of the Ashland constantially as here traced, but asserts that it occupies a position with reference to the patented boundaries of the Ashland different therefrom (October Brief, pages 167-185).

In the original brief, pages 21-22, we refer to the testimony in the record which establishes the position, strike and extent of the Ashland fissure vein and apex, without quoting from the testimony.

Respondent, by its counsel, admitted the continuity of the ore in the fissure, which is the Ashland vein as it had been testified to by the witnesses examined on behalf of the petitioners prior to witness McNeill (Original brief, pp. 22, 23; Record, pp. 282, 283). This evidence and admission put beyond controversy the existence of the Ashland fissure vein, and eliminate from this case all question or dispute of its existence as a vein which might be followed upon its dip. No relation between the course of the apex and the boundaries of the claim is asserted to interfere with the existence of the extra-lateral rights to the extent that the apex is found within the patented boundaries of the claim. There is a dispute as to this extent.

The presumption to which we called attention in discussing the course of the Kempton applies to the extent and position upon its strike within the Ashland claim, as patented, of the Ashland apex, and carries it through the northerly end line, so that we may, for the purposes of defining the extra-lateral rights of the Ashland claim, draw planes through the two end lines of the claim and extend them in the direction of these end lines across the three claims of the respondent, Northern Light, Grizzly and Fairview. The Ashland vein does not extend upon its dip under the Jordan Extension claim.

The position of the boundaries of the claims upon this map is identical with what we have claimed and shown them to be in our original brief, and as they are laid down upon Exhibit X at the back of the original brief. These boundaries thus shown differ in vital features from the position attributed to them upon respondent's maps. In our original brief, pages 107-117, we have presented data and their application, showing that petitioners' maps are correct and respondent's erroneous where these differences exist.

The matters left in dispute between respondent and petitioners concerning the Ashland apex rights are determined by the ascertainment of the position of the northerly patented boundary of the Ashland claim; for if it holds the position which we have given it, which we have demonstrated it occupies, the foundation for respondent's claims with reference to it are eliminated. Just here the importance of the differences between Jessen and Smith, as to the lines of the Grizzly apex claim, become paramount; for it is only by the differences between the patents and Smith's survey, all of which he stated were to the advantage of the United States Mining Company, that there is any presentation upon which differences exist between respondent and petitioners and the respondent secures anything to stand upon in its contention.

Accepting the true boundary lines of the claims, as shown in the Ashland apex map, and the true position of the Ashland apex as there exhibited, there is no crossing of the two alleged end lines of the Grizzly claim or its two side lines as surveyed. There is no portion of the Ashland apex within territory patented to the Northern Light claim; and the contention of respondent, that the discovery vein of the Grizzly claim crossed the side lines of that claim, converting them into end lines, and that the Ashland vein upon its strike crossed both of these new end lines of the Grizzly claim, thus establishing within its boundaries an apex extending across the Grizzly claim and covering the ore bodies to the west between its side lines within the boundaries of that claim, and thereby giving intralimital apex rights, because of the ownership of a portion of the Ashland apex, to the Grizzly, for all the ores within its boundary lines, vanishes from the case.

It is singular that at one time we find the respondent denying that the Ashland is a true vein, or that it has such a definition of its ore bodies and walls as to enable it to assert extra-lateral rights, at

another conceding it to be an absolutely independent vein differing from the alleged broad lode vein, and then again arguing for its inferential extension, unproved by any workings, but assumed to occupy that position if it continue on its course, cutting across the side lines of the Grizzly claim and thereby enabling the respondent to absorb, by virtue of its Grizzly ownership, all of the ore upon the Ashland vein within the boundaries of that claim.

Before passing to an investigation of the facts and the contention with reference to them by the respondent, and its claims concerning the boundary lines of these several locations, we call attention to some of the legal propositions which combat and defeat these alleged intralimital apex rights of the Grizzly claim.

Unless, upon the basis presented in respondent's brief, the Grizzly is, as against the apex rights of the Ashland claim, an older claim than the Ashland, confessedly the foundation is taken from under this position.

It is argued that the Ashland claim excluded from its patent the conflict between it and the Northern Light claim; that the Northern Light claim excluded from its patent ground now covered by the Grizzly location; and that thereby and therefore the Grizzly claim is a prior location to the Ashland location. This conclusion is not warranted by the premises, and must fail. The Grizzly claim has never been patented, and may never be. What area it may patent is therefore yet undetermined. The Northern Light claim excluded certain ground from its staked boundaries, but did not exclude it to and the Grizzly claim did not patent it. It is the patenting by a claim of the ground in conflict with another location that adjudicates the priority of the claim which patents the ground in conflict. The mere exclusion of territory by a claim which is patented, but which is not patented by another claim, presents no case in which there has been an adjudication, through the proceedings in the Land Office or in any court, upon the subject of the relative priorities of conflicting claims. None of the decisions announce a doctrine upon which it may be contended that if the Ashland permitted the Northern Light to patent territory in conflict with it, or excluded that conflict and the Northern light patented a portion of it only, and the Grizzly claim embraced a portion of the Northern Light within its boundaries, but had never patented the same, that thereby the Ashland had been adjudicated to be junior to the Grizzly claim. The Ashland claim might

well concede the priority of the Northern Light, but in so doing it would not concede anything to the Grizzy claim, whatever its relations to the Northern Light. But in this particular case there is a fact which utterly negatives the argument made upon this subject, for there was a decided conflict of area between the Ashland and the Grizzly claims, for which the Ashland made application for patent and obtained it, as shown by an examination of the area patented to that claim. This action and this patenting of the conflict between the Ashland and the Grizzly adjudicated the priority of the Ashland over the Grizzly claim, or the Grizzly claim thereby waived any supposed priority it had over the Ashland, and that question was thereby determined. There was embraced within this conflict a considerable length of the Ashland apex, covering a considerable extent of the very ore bodies in dispute, which are beneath the surface of the Grizzy claim, and this portion of the apex was patented to the Ashland claim, so that there was a conflict as to which of the claims owned this apex, and in that conflict, by means of the patent thereto obtained by the Ashland, as we have pointed out in the original brief, there was a binding adjudication between these two claims, establishing for apex purposes the priority of the Ashland.

In addition to this, it appears from the notice or location claim of the Grizzly that it purports to have been located in 1870, and therefore under the act of Congress of July 26, 1866. The location of the Grizzly then necessarily was limited to the Grizzly lode, the discovery lode, as it is here called. By that location, at the time when made, no rights upon the public domain except as to this lode were acquired, together with some surface rights for the convenient working of the vein. Act of July 26, 1866, sections 2, 3, 4. Del Monte vs. Last Chance M. Co., 171 U. S., 55. Hence, the Grizzly location did not include, when it was located or at any time prior to May 10, 1872, any portion of the Ashland fissure apex. It was a legal impossibility that it should do so. Hence, whatever the date of its location prior thereto, all rights to the Ashland vein are of later date. The mere passage of the act of May 10, 1872, would not give to a locator of the Grizzly lode, not shown to have any surface rights whatever, an area in which was contained the Ashland fissure apex. Only by some staking of the claim, and definition of the boundaries of the Grizzly claim, which included the surface in which it is asserted that apex exists, could title thereto be conferred upon the Grizzly claim, and

then necessarily it would be of the date of that affirmative act. While the act of May 10, 1872, provides that all claims located after that date and all claims located prior thereto should have all lodes apexing within the surface boundaries of the claim, this could not confer upon a claim located prior thereto, having no boundaries which included an additional lode, title thereto. The respondent has made no showing upon this subject, although it is necessary that it should do so in order to establish the priority of its location as covering the portion of the Ashland apex over the location of the Ashland claim. To do this it would have to show when after May 10, 1872, it acquired this additional vein, and that this was prior to the location of the Ashland claim. No attempt to make this proof is disclosed by the record. The only evidence of existence of boundaries of the Grizzly claim, now asserted to include a portion of the Ashland apex, is a survey of that claim made in 1874, manifestly long after the location and about the time of the entry for patent of the Ashland claim. Therefore it follows that there is an utter failure by the respondent to establish priority of the Grizzly location, as to the Ashland fissure, over the Ashland location.

Counsel at the oral argument claimed that the Grizzly ownership or inclusion of this apex was at least as early as May 10, 1872. It could not possibly have been earlier than that date; it may have been, and so far as the record discloses was, much later. At whatever date it is claimed that it was acquired by fixing the boundaries of the claim so as to include it, it is not shown to have been prior to the location of the Ashland claim.

The contention hitherto with reference to the priority of the Grizzly has proceeded upon the idea that if the Grizzly claim as a claim, or the location of the Grizzly lode, was older than the location of the Ashland claim, the rights upon the legal propositions presented by the respondent with reference to intralimital apex rights would obtain. This is not true, since no right to the Ashland fissure arose or could have existed at the time of the location of the Grizzly claim, or until after May, 10, 1872.

When the Ashland patented the territory in conflict with the Grizzly, including the apex of the Ashland vein, there was an adjudication that the location of the Ashland upon this vein was prior to any location upon this vein by the Grizzly claim, as well as an adjudication of the priority of the location of the Ashland over the location

of the Grizzly claim. Were it true that the Grizzly had intralimital apex rights upon the Ashland fissure, it would not, even upon its own assertion concerning the boundaries of the claim, have this right to the entire width of the Grizzly claim as staked, but only for that part thereof outside of the Ashland patented area and the Northern Light patented area, and within the northerly side line and a line drawn parallel thereto at the point where the apex passes through the area patented to the Ashland into the Grizzly claim, and it would only extend in its westerly course to where it would be intersected by a line drawn through a point where the foot-wall of the Ashland vein passed through this line, upon the doctrine claimed, and conceded by the respondent, that the claim patenting a portion of the width of the apex in conflict territory takes, as against a junior locator thereon, apex rights to the extent that any part upon its strike of the apex is within the claim. Drawing a line parallel to the Ashland claim across the Grizzly, at the point where respondent claims the entire width of the Ashland apex passes out of the Ashland patented area, even upon the false assumption as to the position of the Ashland and Grizzly and Northern Light claims, all the ore in controversy as a part of the Ashland fissure is covered by the Ashland apex and is the property of the petitioners. Therefore, upon respondent's own theory, it could only cover, with its alleged apex, a strip along the northerly side line of the Grizzly claim; in fact, it would have no intralimital apex rights whatever, for the reasons we have pointed out. This legal result, upon the condition of titles evidenced by the record, eliminated all question of apex rights within the Grizzly claim from this litigation. This being true, whether the Northern Light, the Grizzly and Fairview claims are older or younger than the Ashland, becomes immaterial, since a junior location has a right to follow the vein of which it has the apex upon its dip beneath the surface of older locations.

This brings us to a consideration of the extent northerly, from the southerly side line of the Ashland apex within the patented area, of the Ashland claim. The witnesses for petitioners trace this apex through workings at the surface to and beyond point 910, wholly within the patented area of the Ashland claim. Drawing a line parallel to the Ashland end line through this point 910, across the three claims of the respondent under which the Ashland vein dips, gives to the Ashland claim, by virtue of the ownership of its apex, all of the Ashland vein in the disputed territory, and title to all the

ore bodies within the Ashland vein within those limits, and this is all the ore bodies claimed by the petitioners by virtue of the ownership of the Ashland claim. Again, if the extra-lateral rights of the Ashland are restricted to the distance for which it has the entire width of the apex within its claim, it will be observed that it patented this entire width of the apex for a distance of more than fifty feet, in ground in conflict between the Ashland and Grizzly claims, according to the maps and claim of position of boundaries of the respondent, and, therefore, upon what we understand to be the position upon this subject of the respondent, the Ashland claim would have apex rights against the Grizzly claim and any intralimital apex rights it asserted for an area covered by this apex, which would be defined by drawing a line through the point where its hanging wall crossed through its patented area parallel to its end line across the Grizzly and other claims. This would not cover all the ore in dispute, but a greater portion of it. This brings us, in the ascertainment of Ashland apex rights, to the fixing of its patented area, which depends upon the true, real and relative positions of the Northern Light and Ashland claims, the Grizzly and Ashland claims, and the Fairview and Ashland claims. In the original brief, in the exposition of the errors of respondent's maps, we gave a demonstration which is yet unrefuted by any statement of fact or any argument which assails the integrity of that demonstration. In addition to what was there presented, it will be found that the Fairview patent, the Northern Light patent, the Ashland patent and the Kempton patent, all contain calls and ties which are unanimous in the declaration that the Ashland occupies, with reference to the Kempton, the Northern Light, the Grizzly and Fairview claims, the position exhibited upon map X, and, freed from involved lines, more distinctly shown in the Ashland apex map made a part of this brief and argument. To prevent repetition we present herein our response to the October brief of respondent upon this subject, with reference to the propriety and correctness of the attack, so-called, made in our original brief upon respondent's maps upon this subject, and our vindication of the maps of petitioners and the map we here exhibit.

At pages 94 to 117 of our original brief attention was specifically drawn to errors upon respondent's maps in the boundary relations between the claims involved in this litigation, and data derived from

the patents of the Kempton, Ashland, Northern Light and Fairview claims was utilized in connection with the position assigned by Jessen and Smith jointly to the Kempton claim and to corners 1-2 and 3-6 of the Ashland claim, as the warrant and perfect proof of the correctness of our assertions and of the correctness of the maps we introduced, with the exception of the position given to the Mountain Gem upon map 21, as the result of adopting data derived from the respondent and its surveyor. The demonstration there made remains unaffected and in all particulars unbroken in its force by anything said in the October brief.

Of sketch map No. 1, which is attached to respondent's brief giving certain courses and distances, it may be said that the fact is that what is presented in opposition to our demonstration amounts to a claim by the respondent that there are ties to points upon their maps to other claims than those here in immediate controversy, which agree with the patents of these claims. None of these ties, it will be observed upon examination, are contained in the patents of the Kempton, Ashland, Northern Light or Fairview claims, excepting only corner No. 4 of the Northern Light. They might be correct, and yet the claims involved in this litigation in their relations disturbed, distorted and misplaced, exactly as we have demonstrated they are. It is not a difficult thing to adjust and readjust the boundaries of claims so that their relative positions as to parts thereof will remain as before, while the relations of other parts will be distorted and the relations of the combination utterly destroyed with reference to still other claims. By way of illustration, it will be found that the distance between the discoveries of the Grizzly and Northern Light upon respondent's maps is in substantial agreement with the same distances shown in the patents upon which the maps of petitioners and respondents are based, but they do not agree.

SKETCH MAP 1.

There is attached to respondent's brief a map called "Sketch Map 1," with extensive notes upon it; and there is a discussion in the brief with reference to it. This may is intended, no doubt, as a refutation of what has been presented by petitioners in the way of impeachment of the maps of respondent concerning the boundary lines of the several claims to which we have many times referred, and in support of our

position with reference to which we have cited definitely and at considerable detail, because of the importance of the results connected therewith, the evidence and reasonings which invalidate these maps and impeach their accuracy. The sketch No. 1, when tested by scaling the distances it exhibits, when the relations of the claims are examined, will be found to embody all the errors, inaccuracies, and distortions of which we have complained, and, instead of disproving their existence, re-embodies and combines them. It is not a map made in accordance with the position of the claims, nor upon the facts in evidence. To go in detail over its ties would be but a needless consumption of time; for that has been done completely in the original brief and here, so far as a demonstration of its erroneous and unreliable nature is concerned.

In view of a complaint contained in the October brief and presented in the oral argument that the respondent was not advised what counsel was responsible for the attacks made upon the accuracy of respondent's maps with reference to the boundaries and positions of the claims and of the limestone outcrop, it may be said that it was not intended by this brief to make an attack upon or to impute improper conduct to counsel for the respondent; but as to the attack itself, and the impeachment it makes of the respondent's case, we desire to say that these maps and showings were challenged, attacked, and we believe it may be properly said impeached successfully, at the trial, by evidence, in argument and in briefs which have since been filed. The same detail in argument has not always been presented which it was deemed proper to present in the original brief herein, in view of what had occurred in the Circuit Court of Appeals.

It certainly can be a question of no consequence as to what eye first detected, what voice or pen first exposed, these misrepresentations of important facts. The exact purpose of the inquiry as to the identity of counsel connected with the preparation of the brief is not apparent. Counsel might well have assumed that all counsel whose names were attached to the brief stood equally responsible and willing to be held responsible for what was contained therein. As to the identity of counsel urging and insisting upon the propriety and justice of this so-called attack at the oral argument and in the present brief there can be no doubt. What has been done in that behalf has been in the line of presenting to the court important facts disclosed by the testimony going to the merits of the cause, and to the integrity of

respondent's case. The most important, the only material inquiry concerning them, is not who wrote a brief, who suggested or discovered the existence of the things asserted, but are they justified? Do the facts warrant them? Are the maps and presentation of the case subject justly to the criticism and attack made upon them? That they are, petitioners submit upon the evidence and the discussion which has been had upon that subject.

Some criticisms of alleged inaccuracies in trifling matters contained in the original brief have been presented which do not call for enumeration, much less discussion. One of them may be noticed as indicative of the character of others. It is said that a misquotation was made of the testimony of Smith in a quotation therefrom, in that he was represented to have said that he had "*a reason*" for a certain conclusion, when he said he had "*reason*" therefor. We submit the correction, and suggest, however, that his testimony thus corrected is none the less subject to the criticism made of it.

In addition to the data presented in the original brief upon this subject, we have inserted in this brief a copy of the Mountain Gem patent plat, made by Wythe Denby, September 28, 1892, being a part of Exhibit U, among the original exhibits in this case, and which plat was not printed in the record in the Circuit Court of Appeals nor in this court, but is brought here under order of court and stipulation of the parties. It is upon a larger scale than Exhibit C, facing our original brief, p. 26, and is more readily examined.

Taking the data contained in the Mountain Gem patent and examining it in connection with this plat and the Smith map, which was made from a survey by Smith instead of from the Denby actual patent survey, and utilizing the several patents, patent plats and surveys to which we have so often referred, it is found that there was a conflict of surface boundaries described in the patents of the Kempton, the Ashland, the Northern Light, and also in the official survey of the Grizzly claim, which was not patented, and that these conflicts have been observed and recognized upon the ground by the respective owners thereof, as indicated by the mining work shown upon the maps, which had been carried on by the owners of the Kempton and Ashland claims, and it was to re-establish these boundaries and determine the actual conflicts that the joint survey of Jessen and Smith was begun. In that determination the ascertainment of so-called discovery points or discoveries was immaterial, and was so

regarded by Mr. Jessen, as indicated by his testimony in relation thereto.

We have shown in our original brief (p. 108) that the Northern Light, the Grizzly and the Fairview were returned as surveyed by the same person upon the same day, and the Kempton was surveyed by the same surveyor about three months later, and from the manner in which the several conflicts were adjusted it is evident that each of the conflicting claims at that time was held by a different owner, and though the enormous values which it is thought and asserted now some of these claims possess were unsuspected at that time, yet it is fair to assume that each owner was then satisfied with the adjustment of the several conflicting interests, as determined by the survey of Davis, and therefore the patents of the several claims, excepting that of the Grizzly, issued on the basis of his surveys and determination of the conflict. In the matter of the Grizzly, the proceeding for patent ended with the survey, and so far as can be determined by the record in this case it was abandoned, until its attempted revival by the respondent company a short time prior to the commencement of this action, by recording affidavits of annual assessment work done in tunnels in barren limestone long distances from the claim, as shown by the papers on file in this case.

An examination of the claim maps of the petitioners or respondent discloses that the Ashland was in conflict with the Kempton for the full width of the claims. The patent of the Ashland shows that the conflict area was excluded from the Ashland to and patented by the Kempton. The relative positions of these claims was therefore thus irrevocably established, and whatever error there was in the tie of these claims, as they existed upon the ground as Smith and Jessen fixed and agreed upon them to the Mineral Monument, was recognized as immaterial and as not affecting the position of the claims, and therefore was ignored by Smith and Jessen and the litigants in this case.

The Kempton conflicted with the Northern Light, an earlier survey and the conflict area was excluded by the Kempton to the Northern Light and patented as a part of that claim. Reference is made to an exemplified copy of the Kempton patent, found in printed Stipulation and Exhibits, pages 8-12. The second paragraph of the patent, page 9 of this record, reads: "Beginning at corner No. 1 * * * U. S. 55 (Kempton), thence south fourteen (14) degrees,

thirty (30) minutes west, sixty (60) feet to a post 4 x 4 inches in size, at intersection of southerly boundary of survey No. 53, made for the claim of George Hardie upon the Northern Light mining claim." And in line 17 from the bottom of page 9, continuing: "* * * to corner No. 8, post 4 x 4 inches in size, marked U. S. 55, No. 8, thence north seventy-five (75) degrees, thirty (30) minutes west sixty-seven (67) feet to post 4 x 4 inches in size, at point of intersection with easterly boundary of said survey No. 53." Thus giving a double tie between the Kempton and Northern Light claims and rendering the relative parts of outlying portions of either of them absolutely simple and easy of accurate determination. Petitioners maps agree exactly with each of the ties or connections above quoted, as appears from measurement of the lines indicated thereon and the application of a scale to the map in evidence.

The Northern Light, lot 53, was in conflict with the Grizzly claim, No. 52, which, although surveyed upon the same day by the same person, procured the first order or survey number. It was necessary, therefore, that the area in conflict between these two surveys should be determined in the survey of the Northern Light, and be shown in that survey by proper ties and calls. Referring to exemplified copy of Northern Light patent, printed without the plat (Record, pp. 39-42), a description is found of the boundaries, commencing with the second paragraph, page 40, as follows: "Beginning at the southeasterly corner of the claim * * * marked U. S. 53, No. 1, thence north sixty-five (65) degrees west two hundred (200) feet to corner No. 2 * * * marked U. S. 53, No. 2, thence north twenty-five (25) degrees east, four hundred twelve (412) feet to intersection of northerly boundary of the survey made for the Grizzly claim * * *."

Measurements of the petitioners' maps show this distance, as there laid down, to be 408 feet. The same measurement on respondent's maps gives the distance as 282 feet, a difference in favor of respondent as against petitioners of 126 feet.

Again, the patent containing the description states:

"* * * to corner No. 4 * * * thence south twenty-five (25) degrees west four hundred and twenty-eight (428) feet to intersection of northerly boundary of the survey made for the Grizzly mining claim."

Measuring on petitioners' maps this distance is 424 feet, a discrepancy which might arise in platting the maps in running distances of this kind, and is therefore not to be taken as an inaccuracy or different from the survey as made by the patent surveyor. The same distance measured on respondent's maps is 554 feet, showing a difference in favor of respondent as against petitioners of 130 feet.

The description, continuing, states:

"Eight hundred and forty (840) feet to intersection of southerly boundary of the survey made for the said Grizzly mining claim."

This distance measured on petitioners' maps is 834 feet. The distance between the same points on respondent's maps is 960 feet, making a difference of 126 feet in favor of respondent. That is to say, the effect of the differences here shown in the distances between these points, as exhibited upon respondent's maps and as stated in the patent calls, and also as shown upon the patent survey maps, moves the entire Grizzly claim bodily to the south and east and causes it to encroach upon petitioners' property substantially 125 feet, overlapping the surface beneath which is exposed the greater and most valuable portion of the ore body thus, by this transposition of the claim from its true to this false position, put into dispute. It is by virtue of this change in position that respondent makes its claim concerning there existing within the Grizzly claim a portion of the Ashland apex crossing its two alleged side lines, and founds, upon that alleged fact, its contention that there is an apex intralimital right to the ores within the boundaries of the Grizzly claim because of this condition. The materiality of this change and its importance, therefore, can not in this litigation be overstated, and justifies a careful scrutiny of the evidence bearing upon the correctness of our contention with reference to it.

This transposition of the Grizzly claim also makes a conflict with the Kempton claim of 90 feet in width; that is to say, carries the northwest corner of the Grizzly 90 feet within the territory which is patented to the Kempton claim, whereas in fact the claim lies wholly north of the Kempton claim, and by all the patents and patent maps and surveys, as well as by the Grizzly survey, it is shown that this line thus carried into the Kempton claim is without the boundaries of that claim.

In the conflict of the Northern Light with the Kempton and Ashland claims, we have shown that the Northern Light accepted the establishment of its easterly side line at its intersection with the northerly side line of the Kempton, as stated in its patent calls and in the patent map, which is not printed in the record herein, upon said line 67 feet, at a point upon said line 67 feet westerly from post No. 8 of the Kempton survey, lot 65. Petitioners' maps show this easterly side line of the Northern Light exactly upon the point thus described, but the maps of the respondent carry the purported line not less than 27 feet, and according to surveyor Smith 35 feet, easterly of this, its true position, and thereby endeavors to carve out of the Ashland claim, and cover into the Northern Light and Grizzly claims, through the instrumentality of the improvised apex of the Ashland vein indicated by Tyler's dotted line, asserted to be in these two claims, and secure title to the valuable ore bodies developed in the Ashland fissure, conceded to be a fissure different from the broad lode vein.

The Fairview claim was not only surveyed at the same time with the Grizzly and Northern Light, and all by the same surveyor, but the mutual ties in the Northern Light claim and in the Fairview claim, referring to objects, giving distances and courses from points therein, tie these three claims together. The Fairview had no conflict with the Grizzly claim or with the Northern Light claim, and is patented as a full claim containing the acreage due to the length and width given it in the survey. The dislocation of these relations, however, by respondent, as shown by Exhibit X, causes a conflict of more than half the width of the Fairview, between that claim and the Grizzly's true position, and also a conflict between that claim and the Northern Light, whether as mapped by petitioners or respondent. No such conflict in fact exists. The patents of the Northern Light and Fairview are both free from any allusion to such conflict, notwithstanding they are tied together. If there had been such conflict it would have been the duty of the surveyor—and the Government would have refused to issue the patent until this was properly exhibited—to indicate upon the map and to tie by proper courses and distances the intersection points of conflicting lines, and in the Surveyor-General's office in each state, and in the General Land Office in Washington, there is a connected plat, according to the regulations of the Department, and the Land Office, requiring the position of claims to be shown. In addition there is also the large blue print, an orig-

inal exhibit in this case (Ex. 33), brought into this court, furnished by the Surveyor-General's office, which plats these claims without these conflicts, so that we have the patents themselves, the plats that go with these patents, the calls of the surveys, and the official grouping of the claims according to their positions by the Government, all flatly contradicting the conflict shown in the maps of the respondent, as well as the proof here presented and presented in our original brief and in the testimony of Jessen upon that subject, together with the admissions of Smith, surveyor for respondent, when interrogated upon this subject, and when he confessed in substance, and virtually directly, that his conduct in preparing these maps was without warrant and wholly unjustified, and was wholly in favor of respondent. This careful surveyor, like the cautious bookkeeper of whom we have heard, was of course solicitous not to make mistakes, but was careful that when they were made they should not be to the detriment of his employer. An attempt is made to break the force of these official acts, these surveys, patents, plats and ties, by the suggestion that there was the same owner of the Northern Light and the Fairview, and therefore it did not make any difference which patent took the ground, and it was given to the Northern Light but not shown in the maps, and that this was unnecessary because of this ownership. This suggestion is utterly improbable, for no surveyor could or would do the thing thus stated. By the instructions of the Department, under which he acted, he was compelled to show conflicts, whether the claims belonged to the same or different owners.

When Surveyor Smith's attention was called to the fact that the misrepresentation of the position of the Fairview claim represented upon his map indicated that the West drift from the Kempton tunnel had penetrated beneath its surface for some distance, he confessed that the map was in error, and thereupon, as we asserted in our original brief, amendments were made in the Bill of Complaint to conform to this evidence and this admission, constituting a confession of the inaccuracy of the map and of the erroneous theory upon which it had been constructed.

Ignoring the admissions of the witness Smith, that the Fairview claim was incorrectly shown upon the maps of respondent, that there was no conflict between that claim and the Northern Light, and the facts quoted from the record, showing that counsel for respondent, as charged in the original brief, had requested and obtained leave

to amend respondent's bill to conform to the proofs contained in the admissions of respondent's witness Smith, counsel for respondent in their October brief, at page 114, makes this statement concerning what was said in respondent's original brief at page 116:

"In petitioners' brief, at page 116, it is said: 'There was a practical recognition of the erroneous positions given to the several claims by the surveys of Smith in the progress of the trial. Mr. Smith had testified that the lower west drift upon the Neptune tunnel level had been extended westerly in ore into and beneath the Fairveiw claim, whereupon his attention was directed to the fact that the respondent's maps showed the Fairview as overlapping the Northern Light claim, and occupying a position a considerable distance to the east of the true location, as shown by the patents of the several claims, and that by reason of such changed position, the said tunnel of the petitioners appeared to have entered the Fairview claim, whereas in truth it had not penetrated within eighty or more feet of the true southerly side line of their claim. The error was then and there admitted by respondent's counsel, and by permission of court, at respondent's request, it amended its bill of complaint, by striking out the words 'and the Fairview mining claim.'"

"Neither expressly, nor by implication, was there any admission or suggestion on behalf of respondent, that there was any error in so platting the Fairview and Northern Light mining claims, as to show one overlapped the other."

Respondent in its brief, by a course of subtle reasoning, exhibiting great mental prowess as well as some logical audacity, attempts to justify the claim made that the map which gave this admittedly false position to the Fairview and Northern Light claims was nevertheless a correct map and gave the true position of those claims. We quote from the record the testimony of witnesses and the action of respondent, through its counsel, which followed vindicating, we submit, the language of petitioners brief quoted by respondent above:

Record, page 89:

TESTIMONY OF SMITH. CROSS EXAMINATION BY HILES.

"Q. Explain how it is that in this plat you have platted the Northern Light as being 52 feet east of where the patent calls for it as it is referred to and measured to the permanent United States Mineral monuments?

"A. I accept the verity of ties close by instead of those remotely situated.

"Q. In that you have got all these claims further east and south than the calls of the patent demand, is that so?

"A. No, sir.

"Q. Well, this Northern Light is 52 feet, you say?

"A. Yes.

"Q. How much further south and east is the Fairview?

"A. I have not figured the Fairview connection.

"Q. Is it not a fact, Mr. Smith, that the Fairview claim as it is patented does not overlap the Northern Light at all?

"A. As it is patented the description shows that it does not lap on the Northern Light.

"Q. How much difference?

"A. In the neighborhood of about 70 or 80 feet.

"Q. 70 or 80 feet you have overlapped the Fairview on the Northern Light when the patent does not make any overlapping at all; is not that the fact?

"A. The patent is issued on the assumption that the courses and distances reported between the discoveries of these two claims is correct. By examination on the ground I found that that is not correct and consequently finding the real monuments I have laid out the ground as it really has been patented.

"Q. The patent does not make any exclusion or exception of the Northern Light from the Fairview or the Fairview from the Northern Light does it?

"A. That is true.

"Q. Wherever there is any conflict do not patents expressly except the conflicting part?

"A. If the survey is accurate enough to know there is any conflict.

"Q. So that the patent in this case makes no exclusion of the Fairview from the Northern Light or the Northern Light from the Fairview and there is no conflict whatever in the patents. Is not that so?

"A. The patent represents the two southeasterly lines to be identical with the Grizzly and Northern Light not to be in conflict." * * *

Then follow arguments of counsel, which continued until the noon recess. (Record, p. 100):

"And thereupon the court said that the trial would be proceeded with, and that the motion to dismiss, etc., would be taken under advisement for the present.

"MR. DICKSON: In order that the bill may conform to the proof, we ask leave to amend the bill by striking out of the seventh paragraph

on page 6, from lines 10 and 11, the words 'and the Fairview mining claim.'

"Objected to by defendant because it does not conform to the evidence. Objection overruled and amendment to that effect permitted by the court by interlineation, and the same was done accordingly."

Therefore, not only by the testimony of Jessen, but admittedly, by the patents, patent surveys and patent maps controlling in this particular, and connected with undisputed original monuments and claims, it is shown that the entire group of claims under consideration occupy the position shown, one to the other, by the petitioners' map, with the exception of an unimportant discrepancy referred to in the original brief at the Northern end of the Ashland, and demonstrates beyond refutation that respondent's maps are utterly misleading in these important particulars where they conflict with or differ from the maps of petitioners, and especially where they are of greatest significance upon the issues of this case.

LIME LODE. LIMESTONE STRATUM NOT A LODE. THE ORE CONTAINED WITHIN IT IN SEPARATE VEINS. EVEN IF THE LIMESTONE WAS A LODE, ITS APEX IN THE CLAIMS OF THE PETITIONERS, WHOSE CLAIMS BY THE ISSUANCE OF THE PATENTS ARE ALL OLDER AND THEREFORE ENTITLED TO ASSERT APEX RIGHTS AS AGAINST THE APEX RIGHTS OF THE MOUNTAIN GEM CLAIM. THE MOUNTAIN GEM CLAIM ERRONEOUSLY PLACED UPON THE MAPS, AS DEMONSTRATED IN ORIGINAL BRIEF AND DISCUSSION IN OTHER PORTIONS OF THIS BRIEF. ILLUSTRATION OF IT BY CORRECT MAP.

(a) Since respondent disclaims and right to succeed in this litigation by virtue of the ownership of the alleged limestone lode through the ownership of its apex in the Jordan and Mountain Gem claims, it would appear to be wholly unwarranted to add, in this reply brief, anything to what has been said with reference to it. And since respondent in its October brief proceeds upon the grounds indicated therein just before beginning the broad lode discussion, and the reason for that discussion does not go, nor the discussion therefore

itself, to anything which respondent claims can or should affect the determination of this case, we should be content with the presentation in our original brief, which unquestionably led to this attitude.

The original brief discusses with fullness, and satisfactorily, we believe, the contention that the limestone stratum is a lode in the immediate region under investigation. Therefore, notwithstanding the long discussion upon that subject contained in the October brief, we apprehend that it does not require a discussion of what constitutes a lode at this time, or require much further discussion of the facts and alleged facts which are so often and so sweepingly asserted to give the proof of the existence of the limestone lode.

Denials in detail of each asserted fact, especially the oft-repeated statement in the brief that "this is not denied," "this is conceded," "this is undisputed," is unnecessary from the very nature of the presentation made in the opening brief. It can not with much force be asserted, however, positive the language employed for that purpose, that the petitioners do not deny that vast ore bodies, thousands of feet in extent, and of great richness, have been mined upon in the limestone and found only within it, when in detail, by reference to working after working, petitioners have called attention to the demonstration by the operations in the ground that unchanged, uncrushed unmineralized, native, barren limestone is the character of mineral occupying the position ascribed to this lode, and that ore bodies are not to be found or expected with reason to be found at any point in the limestone, but are to be found as ore bodies usually occur, in the fissures, the lodes either running with or across the limestone and other rocks in the formation.

Reference was made to workings claimed to have been conducted thousands of feet away from the ground in controversy; and the petitioners did not go with witnesses to this distant territory for the purpose of examining it and ascertaining the truth concerning the contents of the limestone there and the manner in which the ore bodies occurred. Similar general assertions were made concerning the limestone in the immediate vicinity of these properties, of the occurrence of vast ore bodies extending from quartzite to quartzite; and upon investigation it was found that ore bodies did occur in the limestone, and did extend from quartzite to quartzite, but did so in fissures which cut across the limestone, and constituted but ore bodies in lodes which

contained other and continuous ore bodies upon each side of the limestone.

It would have been a fruitless quest to seek the facts concerning properties not in controversy when right at hand, in workings open to inspection, an overwhelming refutation existed rebutting and making absurd the poetical assertions concerning the character and contents of the Jordan limestone stratum.

It is true that respondent asserts (October brief, p. 187) that there is but one lode or vein to be dealt with, and that it includes all the ore bodies in dispute; that the ores in the so-called vein or veins of the petitioners are but some of the many ore bodies which are found in the great lode, and constitute but a small part of that lode. It is pertinent at this point to call attenion to the fact that this claim, which includes as well the Ashland as the Kempton vein, is purely rhetorical in its character; for Mr. Holden, who missed no opportunity to urge anything which he could in behalf of the petition of respondent, admitted most positively that the Ashland fissure was a different lode from the so-called Jordan, or, as it is sometimes called, Jordan Telegraph lode (Record, pp. 367-368):

"Q. If, as certain witnesses have said, that there is a fissure here with ore stratified with the fissure, can you say that that is the same as the lode running north and south?

"A. It is surely easy to tell that that is the same lode as this.

"Q. This lode that runs north and south?

"A. Near the north and south Ashland fissure is a fissure I have specified coming later, and is proved to be later than the Jordan lode, and it passes through and is seen in the foot wall and hanging but it is not that ore body that we are talking about.

"Q. It is a different lode then from your Jordan and Telegraph lode?

"A. Oh, it is a different vein entirely.

"Q. A different vein?

"A. Yes, sir. The Ashalnd vein can be followed for quite a distance into the Big Jordan lode and can be traced. It is like all of these fissures; it is somewhat difficult to follow through but the way we do trace them we get a line from the quartzite on either side or from one quartzite wall and follow that line out, but we can't always find the limits of the fissures which we take to be one of the cross-fissures.

"Q. You do admit, do you, that the Ashland fissure is a different lode from the Jordan lode?

"A. Oh, there is no question of it here at all."

And the witness based his conduct thereon with reference to interfering with operations upon that admitted lode (Record, page 353):

"Q. It is only lately that their right to continue to mine there was called in question?

"A. I will have to ask you to state where; you say 'their.'

"Q. In the mine, in the Kempton mine or in the Ashland?

"A. If you mean in the Ashland, I think their right was never questioned by me to mine in the Ashland mine." * * *

The assertions concerning the condition of the limestone with reference to the profound alteration which had occurred in its physical character, the fissurings, shatterings, and crushings to which it had been subjected, have been examined and tested by the standard of actual disclosures, and by the evidence to which we have referred the correctness of these broad, general assertions is refuted. The most sanguine of miners (and miners are a sanguine race) would not deem it worth while to penetrate with many more workings than were run through this limestone to induce them to abandon any theories they might have entertained about its being a broad lode. Whatever may be the extent of the enormous (we had almost said the fabled) ore bodies mined upon so many thousand of feet, as we have been so often and so glowingly told, away off at the Telegraph mine, or somewhere away from the area under consideration (and distance always lends color and added size and increased richness to such existences), this case must be determined by what is found and what is not found in the ground title to which bears upon the ownership of the specific ore bodies about which these litigants are waging this suit. Whatever may be the size and position of such ore bodies as are found and mined upon seven thousand feet and miles away by the respondent, no ore bodies are found within the limestone area which is asserted to constitute the lode containing these ore bodies which are not in fissures and lodes which have nothing added to their character as lodes by the fact that they are to any extent in the limestone; and many of these ore bodies, large and valuable, directly connected with those which are in the limestone, are found in the quartzite. These facts, about which there can no longer be much dispute, and which no theorizing can cover up, are utterly incompatible with the existence of such a lode as the limestone is said to be. When we are told these stories, about vast width and lengths of

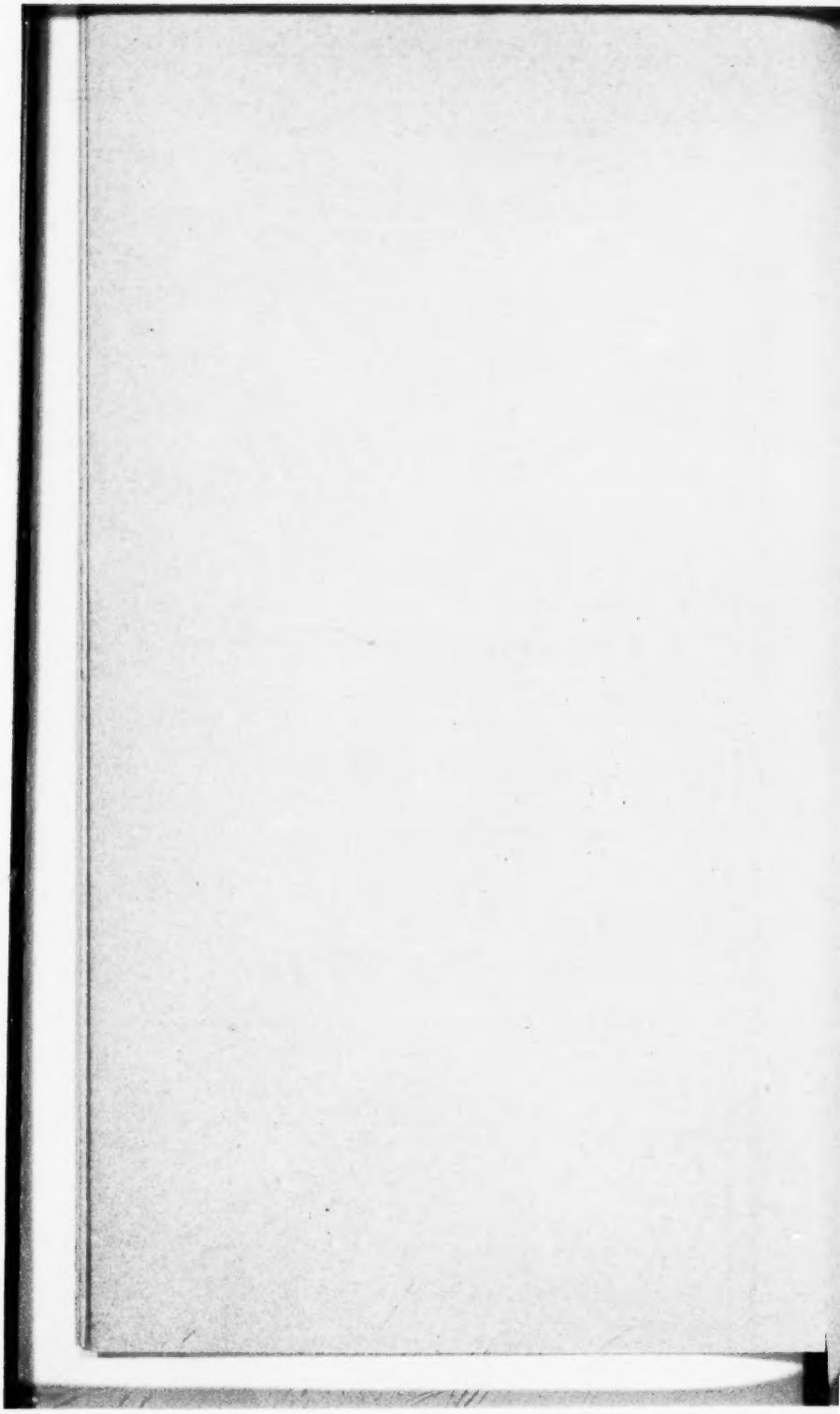
continuous ore, which test our credulity, their position within the litigated area should be designated so that we may not be misled into reaching conclusions about this ground upon the theory that something exists here which is only claimed or asserted to exist a long way off.

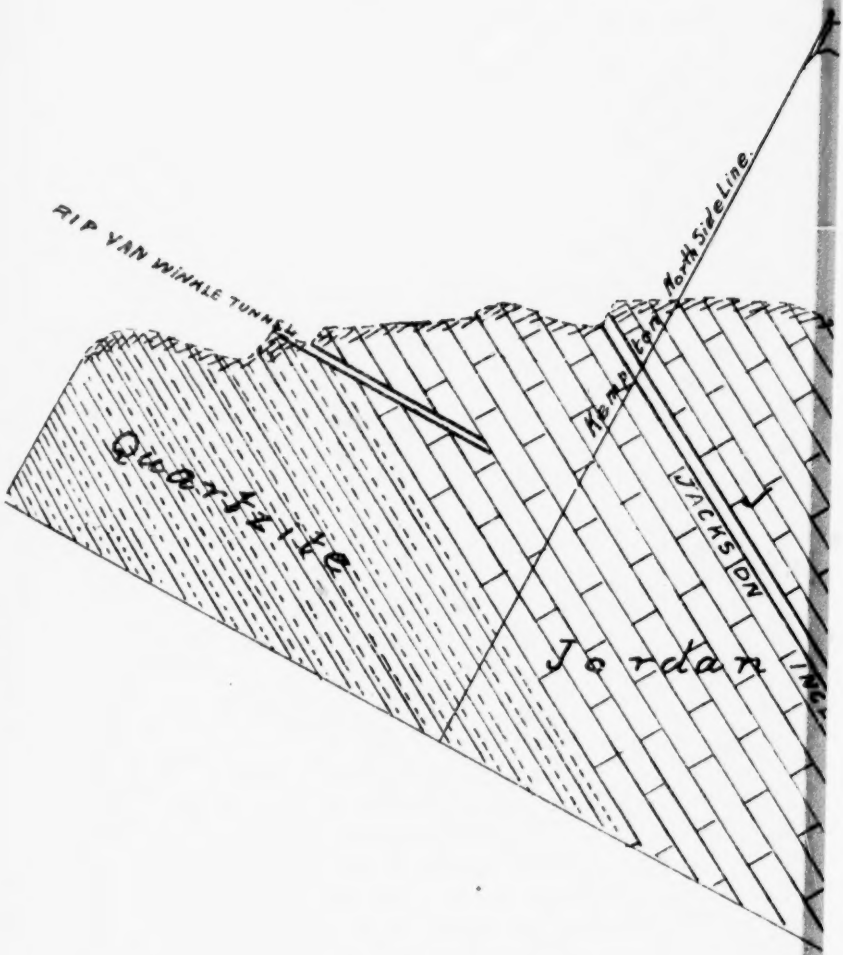
There is considerable discussion in the October brief concerning an alleged fault, which it is claimed carried the westerly continuation of the limestone far to the north, and upon which faulting, as so claimed to exist, an argument is sought to be founded as to the relative ages of fissures and the time of the deposition of ore bodies, and to show that the great vein, the great Jordan limestone lode, continued on its course beyond where upon the maps of the ground in controversy it seemed to terminate just west of the Ashland claim. The significance of this contention is not apparent, nor is the contention supported by what is alleged in its behalf. Were it a matter of consequence, or did it affect the ore bodies which lie to the north and east of the alleged line of this fault, a discussion of it might be made. This is not, however, the fact. It is not correct, however, that the alleged facts upon which respondent bases its contentions are conceded or are not denied by witnesses for the petitioners. It is sufficient upon this subject to call attention to the testimony of Colonel Wall, found at page 522, *et seq.* of the record. It is to be presumed that the limestone entered somewhere. The fact that a limestone stratum was found several thousand feet away can have no bearing upon the issues in this cause, whether it had been a part of the Jordan limestone and faulted from its connection with it, or was laid down originally where found.

(b) The limestone apex, if it be the apex of a lode, is within and crosses both end lines of the Kempton claim; so that if it were possible that the limestone should be adjudged a lode, in view of all the facts of this case, then its apex is within a claim of the petitioners, and lies with reference to the boundaries thereof in such position as to give to the Kempton claim, on the theories of law and fact advocated by the respondent, apex rights to the ore bodies in dispute.

A sketch presenting the position of the limestone and its relations to the Kempton claim is herewith presented, called the "Kempton Limestone Map." This map is a correct reproduction of the bounaries of all the claims shown upon it as insisted upon by the petitioners,

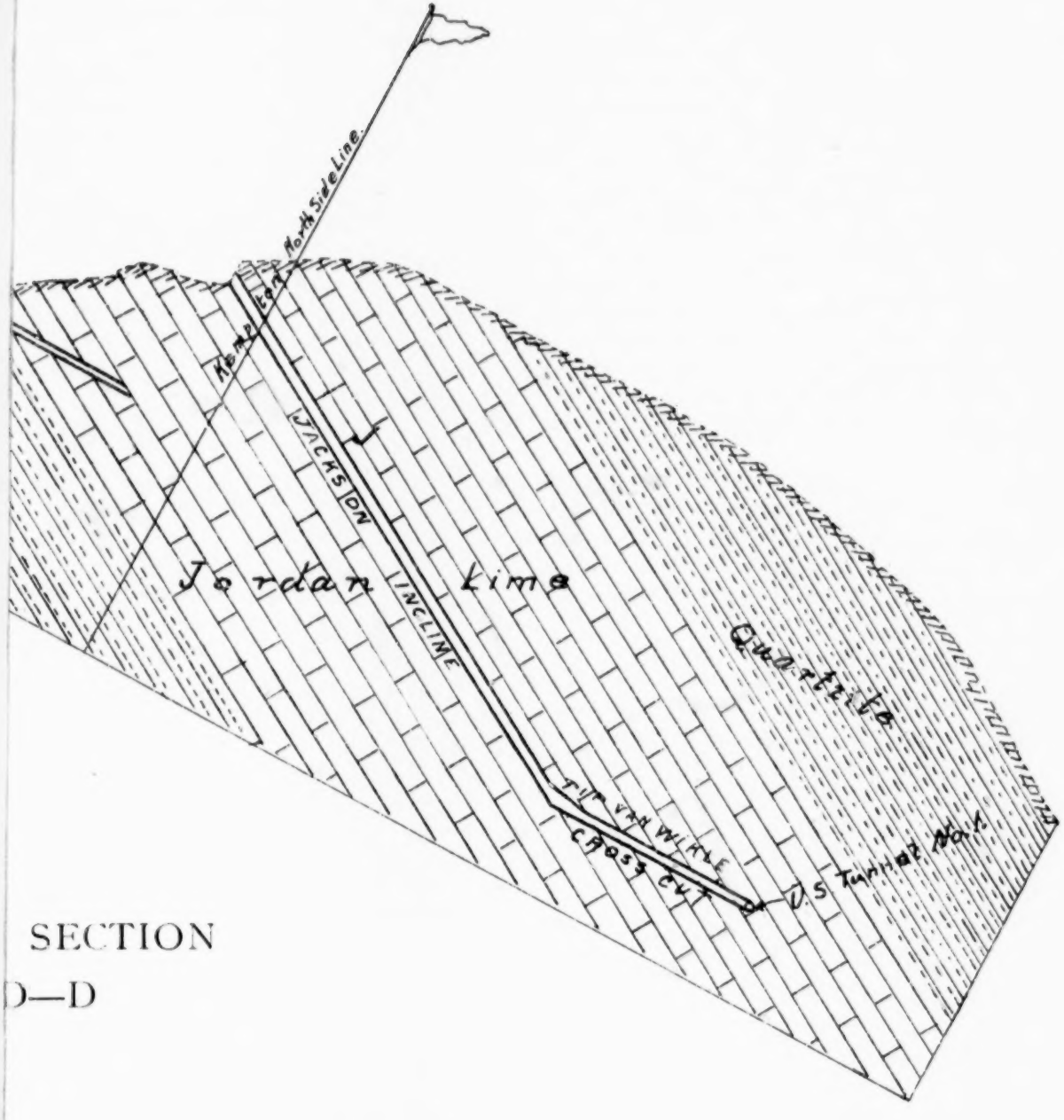
with the exception of the Mountain Gem, which is placed upon this map in the position which it is given upon the maps of respondent, and upon Map 21 of the petitioners, notwithstanding our demonstration that this position is erroneous. The reason for so placing it is that during the trial maps showing it in this position were used in the interrogation of witnesses concerning the position of veins and outcrops to the points given upon the map to corners, posts, and so forth of the Mountain Gem claim. The map shows in hatched lines substantially the position of the limestone outcrop or limestone at and nearest the surface of the Jordan, Jordan Extension, Northern Light, Grizzly, and Fairview claims. Upon it lines are drawn through the Kempton end lines indicating the apex rights possessed by it on the assumption of the existence of the broad lode. There are also shown certain inclines, tunnels, and other workings in the limestone, and the line of two cross-sections to which attention is called, D-D and C-C. There are placed upon the maps also a number of courses and distances taken from the patents, and which have been employed in this and the original brief in fixing the boundary lines of the claims. The position of the Kempton upon this map is that agreed upon by Jessen and Smith, and represents the position they gave it upon the ground. This map shows the limestone of a substantially uniform width of about 300 feet, and as to these dimensions agrees with the testimony upon this subject of Morehouse, McNeill, and other witnesses who ascertained its width by measurements upon and workings in it; and its position and its width are ascertained and herein established by means of the cross-sections cutting through workings in and upon the limestone. This position of the limestone causes the outcrop to pass through both end lines, 1-2 and 5-6, of the Kempton claim, the northerly or hanging-wall boundary of the limestone passing substantially through the center of line 5-6, and somewhat north of the center of line 1-2. This exhibition, therefore, upon the assumption that the limestone is a lode, and upon the various theories advanced by the respondent, would give extra-lateral rights to the Kempton claim covering all the ore bodies in dispute. The map indicates that near the westerly end line of the Kempton the strike of the limestone is parallel to lines 1-8 and 2-3 of the Kempton claim. This is the showing upon respondent's map. This is disclosed by workings underground, showing that the strike as indicated by the bedding planes of the limestone has this direction,





CROSS SECTION

D—D


North Side Line
Kent Coal
JACKSON
INCLINE
Jordan Lime
Quarry
Tip van Wirkle
Cross Cut
No. 1 Tunnel
No. 2

SECTION

D—D

and that the apex, being nearly upon a level, has the same direction as the strike of the limestone disclosed in the levels. The testimony of respondent, Holden and others, is to the effect that U. S. Tunnel No. 1, or No. 1 west drift, follows the true strike of the limestone a distance of some 900 feet. The same witnesses agree and testify that the petitioners' west drift, upper west drift, and turnsheet level and lower west drift from Kempton Tunnel, are also driven upon the strike of the vein, in substantial parallelism therewith. The Ashland upper and lower tunnels are, therefore, in effect, substantially direct cross-cut tunnels to the true strike of the limestone. Their positions are correctly outlined upon the maps of respondent and petitioners. They show that at the Ashland No. 2 tunnel the limestone is disclosed by that tunnel in contact with the quartzite, Station 702-3 (Exhibit 21), and thence across the limestone a distance upon the tunnel of about 500 feet.

The line of the cross-section D-D is indicated by a line drawn between the letters D-D upon the Kempton Limestone Map, and passed through the Jackson incline, the Rip Van Winkle cross-cut, the United States Tunnel No. 1 west, and also crosses the Rip Van Winkle tunnel, not shown upon the Kempton Limestone Map, but its position is indicated upon Exhibit 21. The Rip Van Winkle tunnel shown upon the cross-section D-D shows the contact between the underlying quartzite and the limestone virtually at the surface. The Jackson incline is in the limestone from the surface, and is carried down on the dip of the bedding planes of the limestone, as testified by Tyler (Record, page 460), The Rip Van Winkle cross-cut is in limestone for its entire length, and the portion of the United States Tunnel No. 1 shown upon the cross-cut is also in limestone. The limestone to the north from the cross-cut as indicated upon this section is where respondents have placed it upon their maps Exhibits T, J, etc. The limestone is carried to the surface upon a dip which is 10 degrees less than the dip given it here by respondents witnesses, Palmer (415-425) Tyler (R., p. 436, 440), and thus gives to respondent an advantage of that many degrees for 40 degrees dip would carry the limestone further north than shown in the cross-section and nearer to the northerly side line of the Kempton 30 degrees. This brings the limestone to the surface with the width indicated, and, when this width is applied to the Kempton Limestone Map, gives the width shown by cross-section D-D.

The cross-section is not at exact right angles to the strike of the limestone, differing some 15 degrees therefrom; and this is taken into consideration in getting a measurement at right angles to the strike of the limestone. This brings the limestone north of the south side line of the Kempton claim a distance of 120 feet.

Cross-section C-C is upon the line indicated upon the Kempton limestone lode by the large letter C-C. It is practically upon the line of the Ashland No. 2 tunnel, following it for part of the way. It crosses the raise from the upper west drift, the west drift of the Kempton tunnel, and the No. 1 west drift of the U. S. tunnel. Near the point of stope at 703 the Ashland No. 2 tunnel discloses the contact between the limestone and the underlying quartzite. The Ashland tunnel shows limestone throughout its entire length to its connection with the west drift, a distance of more than 500 feet. The dip or incline of the limestone upon this cross-section is 30 degrees, and shows the hanging wall of the limestone, or the contact between the overlying quartzite and the limestone north of the Kempton south side line, and some 40 or 50 feet south of the Kempton north side line. The contact between the underlying quartzite and limestone is south of the Kempton south side line. This gives about 170 feet in width of the limestone outcrop within the surface boundary of the Kempton claim at its south end line, within about 60 feet of the south side line, and with a strike which carries it through the south side line. Therefore we have the limestone apex, so-called, passing through the two end lines of the Kempton claim as staked upon the ground. The section D-D is about 75 feet from the northeasterly end line of the Kempton claim; so that the limestone necessarily passes through that end line, and therefore the relations of the limestone apex to the Kempton claim are as indicated by the Kempton Limestone Map. This accords also with the position of the limestone lode as demonstrated by the workings referred to in the original brief, pages 94-99. The limestone outcrop is given upon this map substantially the course given to the limestone upon respondent's map, Exhibit T, to the east of the northeast end line of the Kempton, and up to within a distance of about 175 feet thereof, at which point it is suddenly narrowed up and lessened in width about 250 feet, upon respondent's map, and misses the northeasterly end line of the Kempton claim. In the original brief, pages 94-99, petitioners

exhibited evidence showing the erroneous character of the location of the limestone due to this change in course and width. An attempt is made in the October brief to vindicate the positions given, and this is done by conveniently adopting a dip for the limestone varying from 15 to 40 degrees, and by applying the one dip or the other, without any proof that such dip is applicable thereto, as will furnish a justification for indicating the position of the limestone by projection from some working beneath to the position given it upon respondent's Exhibit T. The dip for the limestone used by the petitioners is that disclosed in a number of workings testified to by a number of witnesses as 30 degrees from the horizontal. Respondent's witnesses gave such testimony as well as did petitioners.

(c) The Kempton claim having patented the conflict between it and the Mountain Gem, which is now left small and fragmentary, as its remnants now are, to contain this wide and gorgeous limestone lode at its apex on behalf of the respondent, is thereby determined to be prior in valid location, and has had waived to it any asserted claim of priority on behalf of the Mountain Gem, and therefore, upon the contentions of respondent, whatever apex rights appertain to the ore bodies in question on account of the existence of the supposed limestone lode are the property of the petitioners through the ownership of the Kempton claim. The Jordan, so far as it contained limestone lode apexing over the supposed ore bodies, was patented entirely to the Kempton, and therefore the Kempton is an older valid claim than the Jordan by the same reasoning, and posesses such apev rights as might otherwise have been attributed to the Jordan claim.

(d) Throughout this brief it has been found necessary to refer, in discussing various questions of law and fact, to the erroneous mapping of the Mountain Gem claim, both as to the area patented to the claim, its position upon the ground, and its position with reference to the Kempton claim and towards the limestone outcrop. This makes it unnecessary here to more than call attention to the fact and its consequences as bearing upon anv pretended apex rights in this resurrected claim. The patent for the Mountain Gem was not obtained until 1898. The claim, according to its location notice, was 1,600 feet in length, and ran north and south, instead if east and west, as patented. So that the line through which the apex, upon

the limestone theory, is sought to be asserted, is through the end line as defined by the course of the discovery lode; and this would preclude the assertion of apex rights in its behalf. This is due to the fact that when, in 1898, about the time the respondent was beginning to gather in the titles upon which it relies in this case, evidently for the purpose of carrying on the campaign in part outlined in this suit, it was placed, with reference to so much territory as was left uncovered by old patents to territory in that vicinity in the form which could be best utilized in the assertion of apex rights. It was located upon a lode running north and south, and the only interest it could acquire under the Act of 1866, or under a location such as is outlined in its notice prior thereto and at any time up to 1892, was in this discovery lode. It is said that it covered the limestone apex; but at that time nobody considered the limestone a lode. It never became a lode until it did so by virtue of certain mental operations on the part of Mr. Holden; and the location would have to depend necessarily for its rights and as to what it acquired upon the character and direction of the lode upon which it was located. Here, again, any rights which it now seeks to assert upon the limestone lode could only have been acquired by it after May 10, 1872, since its title to lodes was limited to its discovery lode until the provisions of that Act authorized their enlargement. The first evidence, and the only evidence, of any enlargement of them, is in the patent survey for the claim in 1897, some twenty-two years after the Kempton and Ashland claims were patented. Therefore, as to any supposed or asserted apex rights by virtue of the limestone lode, the Mountain Gem is in the same position as to their acquisition as the Grizzly concerning its pretended intralimital Ashland apex rights. Fuller discussion of objections to the claim and the circumstances under which it is sought to be utilized would be but a recapitulation here of what is said in the original brief and elsewhere in this brief. A significant response to these criticisms is contained in the October brief, page 277, at which page the brief says:

"Respondent's property is sought to be invaded by petitioners, and respondent is authorized to bring to its aid *any and all defenses it possesses.*"

And just before this remarkable declaration, which perhaps furnishes a key with which to unlock many of the mysterious surround-

ings of this case, and reveals the theories upon which many things have been attempted and many things have been done in the way of maintaining respondent's cause, counsel have said that the fact that the Gem had not been extensively developed, and was of limited area, could have no weight in determining the legal effect of the possession of a portion of the apex of the lime lode under a senior location. But again and again, in oral argument and briefs, the respondent has marshalled in grand array the extensive possessions it owns in this mining region, and would seem to claim some rights as having created or brought to light the ores in dispute. We concede to it all the credit which can possibly come to it as a creator so far as the limestone lode is concerned. That is its handiwork. But we contend it should not take anything out of it that it has not put into it.

It is urged that the respondent has made vast developments, has run thousands of feet in tunnels, which, if true, is upon other properties, by virtue of which no pretense is made that any right whatever has been acquired to the property in controversy, or that this fact constitutes one of the defenses it possesses which it is entitled to bring to its aid. The suggestion made in the brief, and which is utilized to color this litigation in other portions where we shall not discuss it, is that the respondent was the owner of the ore bodies, had developed them, and, inspired by some predatory spirit, the petitioners had assaulted and sought wrongfully, by the grossest of trespasses, by practices which if we were sensitive we might suggest imputed lack of integrity, in an attempt to appropriate the property of the respondent. When did the respondent acquire the title to the Northern Light, the Grizzly, and the Fairview claims? According to the record it has introduced, in 1899. We have called attention to these dates in another portion of this brief. The Mountain Gem was brought into its present shape and patented and title acquired to it by the respondent within a year or two of the same date; while the title represented by the petitioners in the Ashland and Kempton is based upon patents which had been in existence for twenty odd years before respondent acquired the title it now feels justified in using almost any kind of a defense to protect.

When counsel speak of and the brief relates the vast explorations and the many years of operations of the respondent, so far as the facts furnish any warrant for such statements and assertions, it

is with reference to other claims and other mines and other titles, and does not bear upon the ownership of anything, whether it be a presumption or a limestone lode or a Mountain Gem title, concerned with the properties whose title and extent is sought to be fixed by this litigation.

It is said (page 277) that the evidence shows that the Mountain Gem is one of a large number of mining claims owned and operated by respondent as one mine and mining property; that this mine has been worked and developed for many years, and the vast amount of money expended in the development thereof is apparent from the extensive workings shown upon respondent's maps. Does this mean upon the Mountain Gem, or upon the Jordan, or the Northern Light, or the Grizzly, or the Jordan Extension, or the Fairview? If by this and like assertions elsewhere in the brief counsel means that expenditures which were made upon other claims, thousands of feet away, miles away, upon lodes like the Galena, cutting through the limestone, and placing in it as a part of the Galena lode only any ore it contained in that vicinity, or upon other claims which it is indicated belong to the respondent, should be a protection or can be attributed as having been expended on behalf of the Mountain Gem, Jordan, and the four surface claims, there is no fairness in this attempt to create the impression that the Gem and the Jordan and the four other claims in question have for years been explored, or had vast or even considerable sums expended upon them. The pitiful showing of work upon the Mountain Gem is a fair appraisal of the estimate of its value and of the real reliance upon the title which it represented; and this great expenditure upon it as a part of this extensive mine consists of a shaft thirty feet in depth, and a small open cut at the surface, of no appreciable value! These workings would not meet the Government requirements for expenditures for patent work, if properly valued.

None of the ore in controversy is beneath the surface of the Mountain Gem, and never can reach beneath its limits; and respondent is mistaken in supposing that petitioners have sought to assert any title to ores beneath its surface by any character of title up to the present time; for if they are there, their presence is unknown.

We deem it unnecessary to discuss the contention of respondents that claims located prior to 1866 and 1872 may be patented under the Act of 1872. But whatever may be the rule of law upon this subject, such claims must adverse and assert any claim of priority

over conflicting claims when these conflicting claims make application for patent in accordance with the Act of May 10, 1872. To state this proposition is to prove it. It is ably discussed and thoroughly established by a decision of the Circuit Court of Appeals for the Eighth Circuit, New Dunderberg Mining Co. vs. Old, 79 Federal, 598, in which the authorities are cited and discussed fully.

While respondent asserts so stoutly its right to rely upon the Mountain Gem claim as being some sort of a defense, and it has a right to use any at hand, it might have been well for it to explain how the enormous and rich limestone lode entered through the northwesterly end of the Mountain Gem claim, which is a point, and then passed on out through the southwesterly end, which is, for a little distance, about 120 feet wide; so that the claim is in figure something like Cleopatra's Needle, and something larger in size, with the sharp end towards the advancing "Great Jordan Limestone Lode," as it sweeps grandly on from the northeast in its wealth-distributing march.

DOCTRINE OF RELATION.

We have fully discussed the many legal objections and objections arising out of lack of proof of facts necessary to the establishment of a proper basis for the invocation of this doctrine in behalf of the Jordan and Mountain Gem claims in the original brief. Respondent now challenges the right of petitioners to resist the attempt to enforce the doctrine of relation in behalf of these claims upon the ground that there has been a failure to prove the facts which are essential thereto, and in support of this objection at pages 271-4 calls attention to cases asserted to sustain this objection. So far as the cases there cited, being decisions in law actions, maintain the doctrine that a failure to object to the introduction of evidence, or that objections upon specified grounds takes away the right in an appellate court to make objections which were not presented, we accept them as stating the law, but maintain that they are not applicable in this suit or to the situation under consideration. Counsel are in error in the supposition that the only objection made to the application of this doctrine was that the Kempton and Ashland were patented claims. It was contended that the patents made the application of this doctrine impossible, because any other theory would destroy the effect which numerous decisions

and the provisions of the statute apply to the issuance of the patent as against those who had conflicting claims, but failed to assert them, or had judgments against them for the conflict. The injustice of the application of such a doctrine was maintained, and in resistance of an attempt to apply this doctrine solely upon the ground that a location certificate had been introduced and a patent, which patent conceded the superiority, and, we assert, the priority of the claims theretofore patented, because they had patented ground in conflict, might be met by any objection which showed that the cause sought thus to be maintained did not have facts which would support or justify it in the record.

The decree in the court below was against the respondent. It appealed, and came urging objections to the decree. Petitioners were and are resisting the attacks upon the decree in the lower court, and are not now attacking the decree nor arguing against new contentions. No authority presented holds that any argument in support of a contention is to be ignored upon the doctrines they assert. There are many cases holding that it could not assign as error, especially in law actions, objections concerning the introduction of testimony not presented in the court below; could not claim error for a failure of the court to decide upon propositions never submitted to it; might not challenge the theory upon which the case had been tried. But in this court it has been held that upon appeal grounds may be urged even for reversing a judgment which were not called to the attention of the trial court, and that this will especially be done where the objections will prevent the accomplishment of injustice, and tend to secure a righteous result.

In Waters *et al.* vs. Waddill *et al.*, 6 Peters, 389, at page 402, this court said:

"A new ground of relief has been assumed in the argument here that was not made in the Circuit Court, which is that although this court should be of the opinion that a specific execution of the contract ought not to be decreed, still the complainants are entitled to a decree for the rents and profits of the land while it was in the possession of the defendants. The defendants object to this relief, first because the bill is not so framed as to embrace it, and secondly because this claim was adjusted in the action at law, or might have been set up to lessen the demand of the plaintiff in that action. There is no rule of court or principle of law which prevents the complainants from assuming a

ground in this court which was not suggested in the court below; but such a course may be productive of much inconvenience and some expense."

And the Court affirmed the decree refusing specific performance, "but in order to afford the relief for the rents and profits the decree dismissing the bill is opened, and the cause remanded, for further proceedings."

In Woodward vs. Budock, 27 N. J. Eq., 507, the court, when it was objected that a point was raised upon the appeal not presented on the trial, and which seriously affected the parties, and demanded the careful scrutiny of the court, and as to the power of the court to consider it, said:

"This point was not purposely withheld; otherwise it would be instantly rejected. But it was overlooked until suggested here during the argument. It is sometimes said that this court, on appeal, will not permit parties to raise objections which they did not present to the court below, not only in justice to the court, but also to prevent surprise and abuse by reserving points expressly for further litigation. These results should always be guarded; but where the entire proceedings are before the appellate court for review, there can be no reason, where there is no intentional omission, and the parties have acted in good faith, why the whole case should not be examined and determined on appeal. It would cause needless delay and expense to send the cause back to the chancellor for rehearing upon the same pleadings and facts where the result might be that the cause would be returned here for the further consideration of this court."

The doctrine of relation, as we point out in the original brief, is an equitable one, intended to accomplish justice, and may not be used for the purpose of accomplishing an injustice. This alone is sufficient to defeat the doctrine of relation for there can be no justice in permitting a claim like the Gem to be metamorphosed, transposed, and revived apparently for the express purpose of asserting title to ore bodies in lodes which had been mined upon for years without the suspicion by anybody or the suggestion of any claimant that they were subject to attack by or belonged in fact to such claims as the Jordan and Mountain Gem.

In Ridings vs. Johnson, 128 U. S., 218, the case had been dismissed in the Circuit Court for want of jurisdiction. This court held

this was error; and the question then arose whether this court might examine for other grounds upon which to sustain the decree of dismissal. Upon this point the court said:

"Therefore, if there was nothing more in the case than the question of jurisdiction, we should be obliged to reverse the decree at once and send the case back for further proceedings. But on an appeal in an equity suit the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided. The bill was dismissed on demurrer for want of jurisdiction. Though the court below may have erred in dismissing upon this ground, yet if we can see that there is any other ground on which it ought to be dismissed—for example, for want of equity on the merits—we must affirm the decree. This makes it necessary that we should go into a further examination of the case made by the bill and supplemental bill. As before stated, we are laboring under a great deal of embarrassment on account of the imperfect condition of the record, and the absence of any indication on the part of the defendant as to the grounds on which the bill is objected to; but we think sufficient appears to enable us to form a tolerably satisfactory conclusion."

The court thereupon considered the case and reversed the decree. It is manifestly upon a doctrine of this kind that the respondent relies in its efforts to induce this court to sustain the action of the Circuit Court of Appeals and reverse the Circuit Court. In equity cases heard upon all the evidence, after the conclusion thereof there is no means of preserving arguments, theories, and grounds for objecting to decrees which are presented at the hearing in the trial court; nor is there any way of preserving them when the case is brought up. The nature of the equity proceeding, as is indicated by this court in the decisions referred to and others cited therein, is that the whole case is before it to do justice upon that case upon the law and the facts which it discloses; and where the record does not contain enough to enable the court to intelligently ascertain and determine these rights, then to make such orders for further proceedings as will enable this to be accomplished.

Humphries vs. Switzer, 11 Louisiana Annual, 320.

In meeting attacks upon the Circuit Court decree, petitioners are not limited to specific arguments that may have been made at the argu-

ment in the trial court, but may unquestionably utilize all arguments, at any time and in any court, which are warranted by the testimony and which tend to defeat the assaults made, whether for the first time in this court, as is true as to many of them, or for the first time in the Circuit Court of Appeals, or whenever and wherever made for the first time by the respondent for that purpose, and also may utilize any arguments which tend to sustain objections made to the positions of the other side, although in the first argument upon the subject the presentation may not have contained all the arguments in support of the position which existed.

NO JURISDICTION IN CIRCUIT COURT TO TRY THIS SUIT.

The contentions upon this subject which we have presented as to all the points fairly involved in our opening brief may be summed up thus:

The petitioners objected, and preserved this objection throughout all the proceedings which have been had in the suit, that this was an attempt to try a law action on the equity side of the Federal court; that all the questions involved related to legal titles; that in the suit itself and the controversies in it there were involved nothing upon which equity jurisdiction could be based; that the rule is, in the United States Court, that bills to quiet title to real estate where no equitable questions are involved, where the controversy is strictly over the legal title to the premises, can not be maintained, for this legal title is susceptible of complete adjustment, and the claimant has complete and adequate remedy by a trial at law to ascertain his title; that as conditions precedent to the jurisdiction of the Federal court to entertain bills to quiet title such as this is (for it is in no sense a suit to remove cloud from title) it must appear that the complainant was in possession of the premises (in this instance the ore bodies) title to which was sought to be quieted, and that there must have been at least one trial at law for the purpose of determining title. It is also contended that in this case all of the requisites referred to are wanting; the title is a legal title; ejectment is an adequate remedy; the respondent, complainant below, was not in possession: petitioners were: there had been no trial at law.

Respondent undertakes to justify and maintain jurisdiction by contending that the complainant was in possession, that it need not have been in possession, that a trial at law is unnecessary as a condition precedent to jurisdiction, and that a statute of Utah gave the right to a claimant of property to prosecute a suit to quiet title in the Federal court on the chancery side without being in possession, and that the Federal court would enforce the enlarged equity right given by the Utah statute and take jurisdiction notwithstanding the lack of possession, and the fact that the legal title had not been tried at least once in a law action.

Petitioners have responded to these contentions that the respondent was not in possession; that the petitioners were; that the Utah statute could not control procedure on the equity side of the Federal courts; that it especially could not do so in trials concerning title to real estate where the controversy was wholly one at law, because this was prohibited, not only by the lack of power in the State legislature to control equity procedure in the Federal courts, but because a Federal statute required such questions to be tried by a jury, and that the Utah statute did not provide as claimed. We have cited decisions of this Court which we yet maintain fully confirm our contentions, and which, when applied to this case, as this Court has applied them to other cases, negative jurisdiction, and made it an error on the part of Judge Riner to consider the case, and are in conflict with the decision of the Circuit Court of Appeals upon this subject. Among other authorities cited were those to the effect that the possession of a vein upon its apex was a possession of the vein throughout its extent upon its dip, and the claim made that it was conceded that the possession of the apex of the ore bodies, certainly if they are within the Ashland and Kempton veins, was held by the petitioners. We have further maintained that the evidence discloses that in fact this is disclosed by the allegations in the complaint, that by workings, levels, and drifts opening, disclosing and blocking out the ore bodies in controversy, the petitioners have taken complete physical possession by the performance of every act which, with reference to an ore body underground, can constitute physical actual possession. Now, it is replied and argued, and page after page of testimony copied to maintain the position, that respondent was in reality in fact in possession; that while the doctrine of posesssion of the entire vein upon its dip

by virtue of possession of the apex is sound, in order that this possession may prevail the holder of this possession of the apex must assert and establish that he not only has the physical possession of the apex, but that in law he owns the vein, since it is contended that this doctrine of possession of the claim by virtue of the possession of the apex only exists where the possession of the apex is rightful, and the possessor of the apex actually owns the ore bodies in dispute. If, in fact the respondent was in actual possession of the ore bodies constituting the premises the title to which is sought to be quieted, all discussion of whether in the Federal court there is necessity for possession, and all discussion as to the effect of State Legislation as enlarging the scope of the jurisdiction of the Federal court in chancery is unnecessary. For the purpose of this discussion of the question of possession it is immaterial whether we consider the apex of the ore bodies in dispute to be the outcrop of the lime lode, or the real apexes of the genuine veins, the Kempton vein and the Ashland fissure; for actually the petitioners were in possession of the apex whether it was the one or the other.

The petitioners were in the actual physical possession of these apexes, not merely by possession of the surface of the claim with an assertion of title thereto, which title is undisputed, but by working upon, handling, digging from, laying the hand of physical possession openingly, notoriously, and exclusively upon these apexes thus situated. Without now inquiring into the possession of the underground workings by petitioners, workings made by them, their grantors and predecessors in title, and therefore constituting the same possession which they held so far as they themselves had not made the excavations, we have asserted and respondent concedes that the possession of the apex is the possession of the vein throughout its entire dip. It would seem, therefore, to follow that the possession thus conceded or established put the petitioners into actual possession of the vein for the entire depth to the extent that the apex thereof was within the boundaries of the Kempton and Ashland claims.

Respondent, to meet this propostion, and to avoid the force of these unwilling concessions, asserts that for the purpose of determining whether the petitioners had possession of the vein upon the dip, for the purpose of ascertaining whether the suit was cognizable in equity or at law, the Court must not only ascertain the existence of

the physical possession of the apex, but try the case and determine that not only were the petitioners in this physical possession, but that they owned the ores in controversy by virtue thereof; and that whatever the physical facts and legal results were in a suit of this kind, the possession or non-possession of the ore upon the dip would depend upon the event of the trial of the suit and the determination of the title to the ore in dispute.

The result is one which we maintain is utterly illogical and necessarily absurd in its results; that is, if in this trial it should be found that the petitioners did not own the ore in question, then, notwithstanding they had possession of the apex, as stated, they did not have possession of the vein upon the dip, although no one else had physical possession thereof; and that if it were found that by virtue of the ownership of this apex, of which they were in possession, they owned the ore in dispute, then they were in possession of the entire vein. So that it results that in order to determine whether the Court had jurisdiction to try the case it must first try the case and determine not possession but the title to the ores in dispute, before it may determine the possession, and therefore its jurisdiction to try the title to the ores. In short, that the Court must try the case upon the merits in order to ascertain whether the petitioners or the respondent had possession; and if it found that the petitioners had possession, then should hold that it was without jurisdiction to try the case, and therefore would have to dismiss the bill—not because the petitioners owned the ores in dispute, but because the Court was without jurisdiction to try, since the ascertainment of the ownership of the petitioners established possession in them, and negatived the right of the respondent to institute and the jurisdiction of the Court to try the suit.

On the other hand, if it should be found that petitioners did not own the ore in dispute, the result would be that notwithstanding their physical possession of their apex, the existence of exactly the same condition that constituted possession, they were not in possession of the vein upon its dip, and the Court therefore had jurisdiction of the suit, and might and should enter a decree for the respondent although the vein apexed outside of its boundaries, it had no workings upon the ore bodies beneath its surface, and succeeded entirely because of the failure of title in the petitioner, and not because of an establishment of title in itself.

It seems unreasonable that such distinctions should exist or may be maintained or made the basis of the determination of litigation. There may be a wrongful possession in the sense that one may be in possession, believing, asserting and maintaining that possession, when in fact upon the merits of a controversy concerning the title he is not the owner of the premises. Nevertheless, the possession in fact exists because of the existence of those conditions which establish possession, but which fall short of or may not even tend to establish ownership or title.

The possession of the apex is the possession of the vein, and this possession may only be terminated by actual intrusion upon some portion of the vein, and occupation by someone adversely to the possession of the apex. What is the inquiry which is to be made to ascertain whether the particular litigant is in possession of the vein? Whether he has such possession of the surface of the apex as is usually recognized as giving the right, if it should be invaded, to maintain legal actions for redress of his ouster? From which it follows that he is in possession of the entire vein, save so far as an actual intrusion thereon may have interfered therewith. To take another view would make the doctrine of possession of the vein upon the dip as a result of possession of the apex meaningless and ineffectual.

This physical possession of the apex, and therefore of the vein, is a fact, an existence, not a conclusion or inference from the ownership; and the possession may be wholly separated from title. When the possession of the apex is with the plaintiff, he has a right, other jurisdictional facts existing, to try in a suit to quiet it, his title to the possession thus held. But with the apex in the possession of the defendant, there can be no possession of the vein upon its dip by the plaintiff because he has possession of the surface of a claim under which the vein dips, and therefore no jurisdiction in equity to quiet the title where possession is held a requisite to that jurisdiction.

The possession of veins upon their dip is essentially different from the possession of the surface of ordinary lands, because of a substantial difference between mining property, the ownership of veins and ore in it, and ordinary real-estate and ownership and possession of the same. By the statute upon which the title to mining claim rests (U. S. Revised Statutes, Section 2322) the locator is the one entitled to exclusive possession and enjoyment of the surface of his

claim and of the lodes throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically. He is not made the owner of nor given the right to the exclusive or any possession of an ore body merely because it is beneath the surface of his claim. The ownership or possession, therefore, of the surface of a claim, does not interfere with the ownership of ore beneath the surface, and which is a part of a vein apexing without the claim. The possession of the surface in nowise gives possession of such ore bodies, and does not interfere with or prevent the possession by those who are owners or in possession of the ore bodies by physical operations upon the same or actual possession of the apex. Possession of such ore bodies exists or does not exist as the result of the possession of the apex, and not as the result of the ownership of the ore. *A* may have possession of the surface of a claim, by the performance of every act which constitutes possession, and like possession of the apex of a lode within it, as a result of which he is in possession of the entire vein therein apexing; and yet he may not be the rightful owner of the claim. He may have a sheriff's deed based upon a judgment entered without proper jurisdiction, and that fact may be established in a proper action. Nevertheless, he is in possession; and the ascertainment of whether the suit to settle the matter is cognizable in equity or at law may not be deferred until there has been a trial of the question of ownership, and then possession determined by the result of that trial.

Upon respondent's theory, if the Kempton vein passes through the two end lines of the claim, petitioners are in possession of the ore body. If it passes through the two portions of one of the side lines, as contended, the respondent is in possession, though their physical attitude and relation towards the ore body is the same in the one case as in the other.

If the respondent is in possession, the actual possession required in suits of this character, the petitioners can not be in like actual possession at the same time. There is no actual possession in the respondent, whatever may be the result as to the contention concerning possession of the apex being possession of the entire vein, and what requisites must exist in order that this doctrine may prevail. The respondent is in possession, such possession as it has shown, of the surface of the claims. It is not, by the performance of any act which constitutes possession of a lode or vein, in possession

of the ore bodies in dispute. That fact, that physical relation to the property, that actual possession of it, of course can not depend upon the relation of the apex in the Kempton to the boundaries of that claim. Unless it is to be decided that possession of the surface of a claim with the apex of the ore body concededly outside of the claim constitutes the actual possession which must be had in order to institute a suit to quiet title, then there is no pretense of possession of respondent.

Passing below the surface, what is, or at the time of the institution of this suit was, the relation thereto of respondent, the relations thereto of petitioners? By drifts and levels and stopes and the blocking out of ore, the actual physical possession thereof was in the petitioners, as was the possession of the means of entrance to these workings. They had made these workings, had constructed the only means of access thereto in the way of tunnels, inclines, and drifts. They had done the thing which would have constituted an invasion of the possession of one who held possession of the apex, and an ouster with regard at least to all the ores that were controlled by the workings they made. To constitute this possession it is not, we submit, sound law to say that while the miner is picking the ore down in the stope he is in possession, but when he pauses between the pick strokes, or when he goes to the surface for a meal or to retire to his home for the night, but remains in possession of the workings and the means of access thereto, he has in any sense abandoned or surrendered that possession. Such a doctrine would be to maintain that if a householder locks his door and goes down the street in the conduct of his business, he has abandoned possession of his home.

To give some sort of support to its contentions, respondent says that petitioners are guilty of trespasses, gross trespasses, wrongful invasion of the property of respondent. If so, trespasses are redressed by actions in trespass at law. If the possession of property has been wrongfully invaded, and thereby the former possessor ousted, actions of ejectment will lie to regain possession, and to try the question of who is the owner of the premises.

If the claim is correct, that in order that the petitioners should have actual possession by possession of the vein upon the dip, that the relations of the apex to the boundaries of the claim must be such as to give it extra-lateral rights, that condition is shown by the evidence to have existed. An effort seems to be made, by quoting largely from the evidence, italicizing portions of it, parenthetically commenting

upon other portions of it, to create the impression that all of the work in the disputed ore body done by the petitioners and their predecessors in ownership of the Ashland and Kempton, had not been done years before the suit was brought, or that some of it had been but recently done, as though if these contentions were true this could affect a question of possession as bearing upon the right of a court of chancery to entertain this suit. That is determined by the condition of possession when the suit is brought. But unmistakably petitioners were then in possession mining ore, and it was because of this actual possession and this mining of ore, about which it is inconceivable that there is any dispute, that respondent instituted its suit and asked for an injunction to stop the mining of ore. Surely then there was possession when the suit was brought, and this is all sufficient upon the question under consideration.

The suggestion that by an action in ejectment nothing can be tried save the right of possession of the empty chambers from which the ore has been taken upon analysis will be found to be wanting in substance, and not to be a warranted conclusion under the law. If possession may be had of a lode, that possession may be invaded. If it may be invaded it may be recovered. If it is to be held that there is no possession in and upon a lode save as to the cavity made by mining ore therefrom, then it is necessarily impossible that anybody should be in possession of a lode or of anything but excavations in it. Such a doctrine would prevent the recovery of land, quarries, coal mines and veins by actions in ejectment, whereas numerous authorities attest not only that theoretically this may be done, but exhibit instances in which the courts have, in actions of ejectment, restored possession, not merely of empty stopes, but of the body of ore in lodes. The suit in ejectment will not merely determine who has a right to the possession of the empty chamber, but will determine who has a right to the title and possession of the lode itself beneath certain surface boundaries within certain defined extensions of planes through the end lines of claims where the ownership depends upon the apex.

Iron S. M. Co. vs. Elgin Co., 118 U. S. 196.
Argentine M. Co. vs. Terrible M. Co., 122 U. S. 478.
Last Chance Co. vs. Tyler Co. 157 U. S. 683.
Reynolds vs. Iron S. M. Co., 116 U. S.
Hyman vs. Wheeler, 29 Federal, 347.

The above are illustrative instances of trial by ejectment of title to mining claims as to ore bodies not mined out where this ownership depended, upon the assertion of the extra-lateral right.

Assertion in the brief no more than assertion in the bill of complaint, however vigorously uttered, tries title. The facts revealed in this case fall far short of divesting the petitioners of the possession of the apex, with its consequences, of the actual possession by workings upon the ore which they held up to at the time of and since the institution of this suit, in the assertion of title, and in performance of those acts which necessarily constitute possession of lodes or veins.

What are the facts. Beginning with 1873 at the latest, mining has proceeded upon the Kempton vein by the owners and those representing and having possession under the owners down to the time when this suit was instituted—a period of nearly thirty years. The things done, the character of the work conducted, the extraction of ore, are fully detailed in the evidence, from which it appears that the possession of the ore bodies in controversy was had by the petitioners, or they did not have it, just as they had or did not have possession of the ore bodies higher up in the Kempton and Ashland veins. Would it be denied, if this was a controversy between the owner of the Grizzly claim and the petitioners, that it was not in possession of the ore bodies opened under the surface of that claim by the extensive workings shown upon the maps made by the petitioners, and those whose possession and labor enures to their title and their possession—former lessees and former owners? Will it be seriously contended that the respondent is in possession of these ore bodies, but its possession, without any physical act whatever on its part or the part of the petitioners, is ousted, and the petitioners are in possession, if the apex of the Kempton vein crosses its northwesterly end line, and terminates at the cross-fissure near the corner of the Mountain Gem, as exhibited upon Map 21, while on the other hand it is in actual possession, and there is no act of ouster on the part of the petitioners, if it crosses through lines 2-3 and 4-5. Is possession so intangible, fleeting, and unascertainable as this contention would make it?

It is asserted that there is copied bodily into the October brief all the evidence bearing upon the subject of possession by the respective parties to this suit. We challenge this assertion. We think much evidence exists in addition to that which has been copied upon this subject. We further believe that the evidence copied, when prop-

erly considered, refutes the very claim in support of which it has been copied. We can not undertake in this brief to reproduce all the other evidence, or to check, line by line, and answer by answer, the testimony copied, and thus try out the unimportant issue of whether the testimony has been copied; but in the opening brief and in some things to which we herein refer, we believe that enough will be presented to satisfy this court that not only did the petitioners have possession of the ore bodies as the result of actual possession of the apexes of the ores, but that they had that possession of the ore bodies themselves which the law must recognize as being exclusive in its character, and as defeating the possibility of any kind of genuine, real possession thereof by the respondent.

Cross-examination of J. Fewson Smith by Mr. Hiles (Record, page 84). This cross-examination follows very careful and guarded testimony by Mr. Smith in response to the examination of respondent's counsel in which he declined to call ore an "ore body," but seemed to be fencing with these terms lest he might in some manner injuriously affect the position of the respondent. He lost none of his care, prudence, or thoughtful consideration of the respondent's interests, when cross-examined.

"Q. What works are represented on those maps?
"A. Whose workings?
"Q. Whose workings are represented on that map, whose underground workings?
"A. *They are the workings that had been done by orders of somebody not in the employ of the United States Mining Company.*"

(Then such possession as these workings established was not the possession of the United States Mining Company, the respondent).

"Q. Well, the work that you have testified to has been done there not by the United States Mining Company?
"A. Yes, sir.
"Q. Do you know who the parties were who were in possession?"

(Here the witness was pre-eminently careful and prudent, and non-committal).

"A. I know the parties doing the work were doing it under the direction of Colonel Wall."

(But the careful witness was not prepared to say that these workings in which the workmen were physically present were in their possession, or even that the work done was in the possession of Colonel Wall, who directed it to be done.)

"Q. When did you first go in there to see them?
"A. I can not say that; at different times between now and 1899. I will state recently the works—I know that the work has been done by Col. Wall. At an earlier date it may have been done under the direction of a man by the name of Sampson.
"Q. But for the year last past, do you know that Col. Wall has been there working in Northern Light ground?
"A. Yes, sir.
"Q. And many of these works are old workings?
"A. Yes, sir."

(The works referred to are the openings made by the petitioners and their predecessors, and are the works in and around and disclosing the ore bodies in controversy).

"Q. They were there when you first took employment with the predecessors in title of the United States Mining Company?
"A. Some of them.
"Q. And were beyond the northerly side line of the Kempton ground?
"A. Yes, sir."

(It appears that the witness had been employed by the respondent, at the time he gave his testimony, something like eight years, and some five years prior to the time when the respondent acquired title to its claims now under consideration.)

By Mr. Sutherland:

"Q. Grizzly side line?
"A. Well the northwesterly side line.
"Q. The claim lies more east and west than it does north and south?
"A. Well at that point, its boundary follows my pointer.
"Q. Do you know where the Ashland tunnel is on that map?
"A. Yes.
"Q. The lower tunnel?
"A. Yes, sir.

"Q. Point out the lower Ashland tunnel?

"A. The yellow level is the first lower Ashland tunnel.

"Q. This long purple line represents what is called the Neptune tunnel?

"A. That is the Kempton lower tunnel.

"Q. That is its portal down the hill to the south of the Mountain Gem?

"A. Yes.

"Q. It runs through the Mountain Gem and through the Kempton into the Jordan Extension?

"A. Yes, sir.

"Q. Who does that tunnel belong to?

"A. *I don't know.*

"Q. Is it a United States tunnel?

"A. *I don't know, I don't know.*

"Q. Has it been used by the United States Mining Company?

"A. The United States Mining Company have run into it and through it *and made surveys at pleasure.*

"Q. They have gone through it upon the license of other people haven't they?

"A. *I don't know.* (Yet he made the survey).

"Q. You don't know?

"A. I don't know. That is all I know about it.

"Q. Don't you know it to be the fact?

"A. Hearsay only.

"Q. That that tunnel for many years has been used for the development of the Kempton mine, what is called the Kempton, has it not?

"A. It has.

"Q. And these workings which are represented on this map show the underground workings of the Kempton mine as they have existed for many years, 25 or 30 years; isn't that the fact?

"A. Not all of them, no, sir.

"Q. Some of them are early workings?

"A. Some of them.

"Q. And some of them recently?

"A. Yes, sir.

"Q. They have been extended in the last year or two a great deal?

"A. They have,

"Q. By whom have they been extended?

"A. Under the direction as I understand of a man named Sampson and later Mr. Wall.

"Q. So that none of these workings here is the work of the United States Mining Company, so far as you know?

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"A. *It has not been done by order of the United States Mining Company, so far as I know.*

"Objected to by counsel for plaintiff as not being cross-examination. But the court overruled the objection.

"Q. Now you remember about the first of the year Col. Wall and these other people were in there at that time, don't you?

"A. Yes."

From this reluctant testimony, so grudgingly given, it is clear that the witness did not desire to concede facts which he, even as a layman, recognized must establish the possession of the petitioners, of the importance of which of course all concerned with the case were, in view of the objections presented by the petitioners, well advised. There could be no doubt, even if there was not abundant other testimony establishing it, that the work referred to was the work of the Kempton and Ashland owners. It assuredly was not the work of the respondent. Whose possession did it constitute?

Such work as may have been done by agreement, consent or stipulation in the premises, was work done after the suit was brought and the injunction granted, and of course would not create possession so as to affect that question at the time the suit was instituted, but in this case consisted of litigation work, and not in the doing of the work upon which respondent has relied as showing actual occupancy of the ore bodies.

The testimony of the witnesses McNeill (Record, page 278, *et seq.*), Colbath (Record, page 159, *et seq.*), establish who did much, at least, of the early work; and the evidence leaves no question upon this subject. The work was done by the petitioners or their predecessors in title, and the possession was the possession of the petitioners.

Upon the legal question as to whether possession is necessary as the basis for an action to quiet title, it has been said that considerable confusion exists in the cases upon this subject, due to a failure to distinguish between actions to quiet title in which possession in the complainant and one trial at law is necessary, and actions to remove cloud from title, as to which the rule is not so absolute and universal (17 Encyclopedia of Pleading and Practice, page 305).

As to the distinction between a bill to quiet title and a bill to remove cloud from title, see 17th Encyclopedia of Pleading and Practice, page 278. This suit is a suit to quiet title as distinguished from

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a suit to remove cloud from title; for a bill to remove cloud is a bill to procure the cancellation, delivery, or release of instruments, incumbrances, etc. (17 Encyclopedia of Pleading and Practice, page 278).

The general question of what is the law in the Federal chancery courts upon the subject of requiring possession in the trial of an action at law as conditions precedent to jurisdiction of suits to quiet title is discussed in our original brief, and is concluded by the decision of this Court in Boston, etc., Mining Co. vs. Montana Ore Co., 188 U. S., 632, 641. It can not be questioned that the Court there announces the doctrine for which we contend. It is urged that the opinion was an *obiter dictum,* and does not announce the law as held by this Court upon the subject. When the reasoning and the necessity for the determination of what is there announced is ascertained, as it must be, by a reading of the decision, any attempt to nullify the force of the decision upon the suggestion that the Court was passsing upon something which was not before it, and in the dispostion of the case where this determination was not proper, or that the Court was not stating what it held to be the law, utterly fails. A discussion of a number of authorities cited in respondent's brief upon the subject of jurisdiction we suggest is here unnecessary, because of the decisions of this Court, and because of the doctrine actually announced in the cases referred to when examined. We submit to the Court, without comment, the argument and the appendix to the October brief with reference to the case of Park vs. Wilkinson, and believe it will be found that the law as announced by the Court in the reference as cited in our brief will prevail against the attempt of counsel to argue it away.

It will be impossible to take up each assertion concerning the law, the facts, and the case contained in the 297 pages of the October brief, and discuss them in detail. Such course is, we believe, unnecessary. What has been said is a discussion of the case, and necessarily includes lesser matters and propositions not specifically noticed, and we may not be assumed to admit asserts, or to accept as sound legal contentions, or to concede the correctness of the interpretation put upon cases cited, or the inferences drawn from facts or their existence, because these matters are not discussed or mentioned.

With an apology for the length of this presentation, rendered necessary by the reception only a little while before the oral argument in this case of the October brief, and the inability to compress, in the

time at command, what it has been deemed proper to say in response thereto, and finding justification only for this action in the number and importance of the questions of law and fact presented, and the importance of the cause, the petitioners respectfully submit that the action of the Circuit Court of Appeals was erroneous; that this Court should decide the controversies here presented for the petitioners, either dismissing the bill because there was no jurisdiction to entertain it, or upon the merits finding and decreeing for the petitioners, as did the Circuit Court, after a full and fair trial, with the best of opportunities to ascertain the facts from the testimony.

CHARLES C. DEY,
CHARLES J. HUGHES, JR.,
Solicitors for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 24.

LEONIDAS M. LAWSON, WILLIAM J. HARVEY, EDWARD BALBACH, JR., ENOS A. WALL, HEBER M. WELLS, THOMAS KEARNS, JUNIUS F. WELLS AND THE IVANHOE MINING COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES MINING COMPANY, A CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR RESPONDENT.

We have received from the Clerk of the Supreme Court copy of the reply brief for petitioners in this case. It appears that this brief was filed in the office of the clerk on the 27th of October, but we were not advised of the filing until three

days later, and not having been favored with a copy from the hands of counsel for petitioners, we telegraphed the clerk for a copy, which was not received until the 5th of the present month. The brief consists of one hundred and fifteen pages, and contains much new matter, to some of which we desire to make reply. The time allowed by the court for this purpose is extremely short, therefore our reply must be very brief. We understand, of course, that we have no right to re-discuss any matters which have already been covered by our former brief, nor to reply to anything but new matter contained in the present brief for the petitioners. Many statements of fact are made in this brief which we do not concede, but which will be found to be covered by our original brief. By failing to again state our position in reference to these matters of fact, or to challenge the accuracy of the statements contained in petitioners' reply brief, we are not to be understood as in any manner assenting to these statements.

I.

In petitioners' reply brief it is contended at much length that if respondent bases its claim to a decree quieting its title to the ore bodies underlying the Jordan Extension, Northern Light, Grizzly and Fairview Mining Claims upon the ground that it is the owner of and in possession of said four claims, and, therefore, is presumptively the owner of and in possession of all the ore bodies lying beneath the surface of said claims, it cannot prevail in this suit, because it appears that the apex of the vein containing these ore bodies is not in either of said claims, and it is contended that whenever it is made to appear that the apex is outside of these claims the

presumption that respondent is the owner of the ore beneath the surface thereof is overthrown, and especially, say counsel, must this be true if the apex of the vein is so covered by another mining claim as to give to the owner thereof extra-lateral rights on the lode which would embrace the ores in controversy, even though the claim so laid upon the apex also belongs to the respondent. We do not so understand the decisions bearing upon this subject. Of course, if it were shown that the claim so laid upon the apex as to give such extra-lateral rights belonged to the petitioners, they would be entitled to a decree in their favor. We may also admit that if the claim so laid upon the apex was owned by a third person not a party to the suit, respondent could not prevail; but, we submit, that the owner of the surface of a mining claim will be regarded and recognized by the courts as the owner of all ores beneath the surface until it is made to appear not only that the apex of the vein in which they lie is outside the claim, but also that a mining claim owned by another has been so laid thereon as to secure extra-lateral rights which include these ores.

(We admit the statement of counsel for petitioners that in a suit to quiet title, or in an action of ejectment, the plaintiff must prevail upon the strength of his own title; that he cannot rely upon the weakness of his adversary's right.)

In the case of Dugan et al. vs. Davey, 26th North Western Reporter 887, which was a suit in equity to restrain defendants from prosecuting mining operations within the lines of the Silver Terra mine owned by complainants, a motion for non-suit was made upon the ground that a patent for a mining claim affords no evidence of title to any ore

bodies therein, except such as may be shown to belong to a vein having its apex therein. The motion was denied, the court holding that one holding a patent from the Government for a mining claim was entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by showing that he was the owner of the vein having its top or apex in a claim owned by him, the pursuit of which on its downward course brought him to the ground in controversy. The question received careful consideration in that case, and is very ably discussed. (See pages 889 to 893.)

The case of Parrot S. & C. Company vs. Heinze, 25 Mont. 129, was an action, as stated by the court in its opinion, in the nature of ejectment to determine the title to certain openings and ore bodies beneath the surface of the Adventnre mining claim owned by the plaintiff. It was contended by the defendant that inasmuch as it was shown that the top or apex of the vein containing the ore was not within the boundaries of the Adventure claim, the plaintiff had no title to that part of the vein lying under the surface of the claim, notwithstanding defendant had no title thereto. Here again the question was considered at great length with a citation and discussion of authorities, and the court held that "A patentee of the United States may assert title to the part of a vein beneath the surface of his claim when the extra-lateral right of others do not extend thereto, although the apex lies within another claim."

A like conclusion was reached after a full consideration in the case of Doe vs. Waterloo M. Company, 54 Federal Reporter 935.

The case of Iron Silver Mg. Co. v. Elgin Mg. Co., 118 U. S. 196, was an action of ejectment brought by the owner of the Gilt Edge claim. It appeared that the apex of the vein in which the ore bodies in controversy lay was within the Stone claim, owned by the defendants, but that the same was so laid upon the apex that defendants had no extra-lateral rights thereon which would reach the territory in dispute. The plaintiff prevailed in the court below, and the judgment was here affirmed, the court saying in conclusion: "The premises in controversy are admitted to lie under the surface lines of the Gilt Edge claim eastward from the defendants' claim, and the plaintiffs were therefore entitled to recover them."

The case of King vs. Amy & Silversmith Con. Mg. Co., 152 U. S. 222, was one brought by plaintiffs, who were tenants in common with defendant, of the Non-Consolidated lode mining claim for a partition and for an accounting of ores which had been extracted by defendant from beneath the surface of the claim. Defendant attempted to justify the taking of the ore on the ground that the apex of the vein containing the same was in the Amy claim, owned by defendant. It was determined that notwithstanding the apex of that portion of the vein which would include the ore bodies in controversy was outside of the Non-Consolidated and within the Amy, yet the Amy claim was so laid thereon as to deprive the owners thereof of extra-latteral rights which would include the ores in question, and therefore the plaintiffs were entitled not only to a partition of the Non-Consolidated, but to an accounting for all ores which had been taken therefrom by the respective co-tenants.

The case of Reynolds vs. Mining Co., 116 U. S., cited

by petitioners, contains nothing in conflict with the cases above cited. This is clearly shown by what is said by the court in Doe vs. Waterloo, 54 Fed. Rep., at pages 938 and 939.

The presumption of the common law is that he who owns the surface, likewise owns everything beneath and above it. Except for the provisions of the Federal statutes, a patent from the Government for a mining claim would be subject in all cases to this rule of the common law. Under the statutes of the United States, however, when the Government conveys to a patentee a mining claim, it reserves to any locator or patentee of another mining claim the right to any ores found within the territory of the mining claim of the former which belong to a vein the apex of which is within the mining claim of the latter, so located as to give to such latter claim extra-lateral rights. The presumption founded upon the common law, however, has full force and effect, unless and until some other person establishes the existence of the apex of the vein so located by him as to give him the right to pursue it beyond the boundaries of his own claim. When an action of ejectment or an action to quiet title to an ore body is brought, it is sufficient in the first instance for the complainant to establish that he is the owner of the surface under which the ore body lies. He is then presumed to be the owner and is entitled to a judgment or decree to that effect. This presumption of ownership can be overcome by the defendant *only* by showing that he or some third person has located upon the apex in the manner already stated. It is not sufficient, as shown by the authorities already cited by us, for the defendant to merely show that the apex is

elsewhere than in complainant's ground, neither would it be sufficient to show that the apex was in his own ground but so located upon as to deny him the right to pursue it extra-laterally. Counsel, however, advances the novel proposition that inasmuch as the case for the respondent is based upon the ownership of the four mining claims under which these ore bodies are found, and that it is asserted in the charging part of the bill that the ore bodies belong to a vein the apex of which is within other claims belonging to respondent, that, therefore, the present suit cannot be successfully maintained. If it be true, as we contend, that the presumption of title to the ore bodies arising from ownership of the surface is not overcome by showing that the apex is elsewhere than in the claim where the ore bodies lie, unless it be further shown that such apex is located upon by the defendant, or a third person, in such a way as to give him extra-lateral rights, how can it be said that the presumption is overcome by merely showing that the apex is elsewhere but located in other claims belonging to the complainant himself? Where the respondent owns the claim, underneath the surface of which the ore bodies lie and also the claim within which the apex of the vein containing the ore bodies is found, what concern is it of the trespasser or person asserting adverse claim to the ores, whether respondent asserts title to the ore bodies by virtue of one fact or the other? In the case at bar, respondent relies for its title to the ore bodies upon the ownership of the surface, but respondent also alleges in the charging part of the bill the facts concerning the location of the apex, so that petitioners were advised of all the facts and cannot successfully claim that they have been in any manner

misled or prejudiced. Not only are all the facts pleaded, but the testimony was offered and received without objection by the trial court.

That the contention of petitioners is unsound may, we think, be readily shown. Suppose the owner of a mining claim files his bill to quiet title to the ores beneath the claim as against one who is asserting an adverse claim thereto. The bill alleges ownership and possession of the claim, the existence of ore bodies vertically beneath the same, and that the defendants assert an unfounded adverse claim to such ore bodies. The bill contains no allegation as to where the apex of the vein is, and no allegation as to the ownership by complainant of any other mining claim. The defendant answers admitting his assertion of adverse claim, but as a defense to the bill contents himself with alleging that while it is true that complainant is the owner of and in possession of the mining claim mentioned in the bill and that there are ore bodies as alleged in the bill vertically beneath the surface thereof, yet such ore bodies belong to a vein that has its apex in another claim also owned and possessed by complainant, which latter claim is so laid upon the apex as to give to the owner thereof, the complainant, extra-lateral rights upon the lode which would include the ore bodies in controversy. Upon the coming in of such an answer can it be questioned that the complainant would be entitled to a decree quieting his title, as prayed for?

Put it in another way. The owner of a mining claim files his bill to quiet title to the ore bodies beneath the same against an alleged unlawful assertion of title thereto by the defendant. The bill contains the same allegations and no others

which were found in the bill in the supposititious case above presented. The defendant answers admitting complainant's ownership and possession of this mining claim, the existence of ores vertically beneath the same, defendant's assertion of adverse claim thereto, but alleges that the ore bodies belong to a vein which has its apex in a mining claim owned by defendant which is so located as to give defendant extra-lateral rights which would embrace these ore bodies. When it comes to the taking of testimony complainant establishes the allegations contained in his bill. Whereupon defendant offers to introduce in evidence, merely, testimony to establish that the ore bodies lie in a vein which has its apex in another claim owned and possessed by complainant, which is so located as to give to complainant title to the ore bodies in controversy by virtue of the extra-lateral rights attaching to this latter claim. Would not such proffered evidence be held to be immaterial and irrelevant, and to constitute no defense to the suit? If such proffered evidence were received and not controverted in any manner would defendant be entitled to a decree in his favor dismissing the bill? Would not the complainant upon such state of the case be entitled to a decree as prayed for?

II.

In petitioners' reply brief it is charged that respondent in its October brief abandoned and turned its back upon the the decree of the Circuit Court of Appeals; that it fled therefrom in fear inspired by the attack which was made upon that decree in petitioners' original brief. That when respondent's counsel came to read this attack upon the decree of the

Circuit Court of Appeals they realized that they could not rely thereon; that it must be abandoned, and thereafter and in this court as well in oral argument as in their October brief they changed front. We fully appreciate the marked ability displayed by counsel for petitioners in their original brief, but we respectfully submit that we were not driven thereby "to any change of front," or to turn our backs upon the decree of the Circuit Court of Appeals, and assert with confidence that respondent has not abandoned that decree, nor has it at any time from the beginning of the litigation changed front; that it maintains in its October brief the same attitude with respect to its rights in this suit that it has occupied from the outset.

At pages 180 to 183 of respondent's April brief under the caption, "Recapitulation," will be found a concise statement of the attitude of respondent with respect to every question of law or fact involved in the case. At pages 295 to 297 of our October brief will be found a like recapitulation. A comparison of the two will disclose that the latter contains nothing which is not found in the former and in identical language. Reference to respondent's brief in the Circuit Court of Appeals, pages 103 to 106, will disclose that the attitude of respondent in that court was the same and differs not from the attitude taken by it in the October brief. At pages 18 and 19 of petitioners' reply brief quotations are made from respondent's Circuit Court of Appeals brief to the effect that respondent there contended that the ore bodies in dispute were contained in the broad limestone lode, and that respondent, owning the oldest location upon a portion of the width of the apex of that lode, is entitled to extra-lateral

rights for the entire width of the lode, and that in that court our claim was that there was but one lode or vein to be dealt with, that it included all of the ore bodies, and that the ore bodies in the so-called veins of petitioners are but one of the many ore bodies found in the broad lode and constitute but a small part thereof. We admit it, and call attention to subheads 8 and 9 of Recapitulation at page 182 of our April brief, and to the same subheads found in our Obtober brief at page 297. These subheads are the same in both briefs, and are as follows:

"Eighth: Taking the evidence of the petitioners and that of respondent in rebuttal, it is demonstrated that the limestone belt, bounded by its hanging wall and footwall quartzite, must be treated as one lode or vein, and that it includes all the ore bodies in controversy.

Ninth: That the senior location upon a broad vein which includes a portion of the width of the apex is entitled to the entire vein in its course downward between planes drawn through the end lines of the location, and extended indefinitely in their direction."

See also the 11th subhead, page 297 of October brief, and the 12th subhead of the April brief at pages 182 and 183.

The truth is that what is contained in the charging part of the bill with respect to the apex of the vein, was anticipatory of petitioners' pretended claims of extra-lateral rights, and the evidence given by respondent in rebuttal was introduced to overthrow petitioners' asserted claim of title to any of the ore bodies found beneath the Jordan Extension, Northern Light, Grizzly or Fairview claims, by showing that

petitioners had no extra-lateral rights on either the so-called Kempton bedded vein or the Ashland fissure vein which would entitle them to any of these ore bodies. This, we think, will be disclosed by an inspection of the record. The decree of the Circuit Court of Appeals is in no respect inconsistent with the position taken by respondent. When it was determined by that court that respondent was entitled to the extra-lateral right upon the broad lode, it was of course determined that petitioners had no such right, as much so as if the court had added: "And, therefore, the defendants have no extra-lateral rights upon such lode."

The contention of petitioners amounts to this: That the Circuit Court of Appeals held and determined that respondent was the owner of the ore bodies underlying the Jordan Extension, Northern Light, Grizzly and Fairview by virtue of its ownership of the apex of the vein found in the Jordan and Mountain Gem claims, and upon that ground reversed the Circuit Court; therefore, if the respondent is not entitled to extra-lateral rights on the broad lode by reason of its ownership of the Jordan and Gem; or if the evidence fails to support the claim of respondent that this belt of limestone is to be regarded and treated as a lode, the decision of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court dismissing the bill must be affirmed, no matter how conclusively it may appear from the record that the petitioners themselves are entitled to no extra-lateral rights whatever upon the broad lode or upon any other vein or lode, which would embrace any of the ore bodies beneath the surface of said four claims owned by and in possession of respondent.

III.

In petitioners' reply brief, pages 71 and 72, it is said that the Grizzly mining claim was located under the Act of 1866, and that, therefore, at the time of location, and until the passage of the Act of May 10th, 1872, was limited to the discovery lode, and that the mere passage of the Act of 1872 did not give to the locator of the Grizzly any surface rights whatever. "Only by some staking of the claim and definition of the boundaries of the Grizzly claim, in which it is asserted that apex exists (meaning apex of Ashland fissure) could title thereto be conferred upon the Grizzly claim, and then necessarily it would be of the date of that affirmative act. While the Act of May 10th, 1872, provides that all claims located after that date and all claims located prior thereto should have all the lodes apexing within the surface boundaries of the claim, this could not confer upon a claim located prior thereto, having no boundaries which included an additional lode, title thereto. The respondent has made no showing upon this subject, although it is necessary that it should do so in order to establish the priority of its location as covering the portion of the Ashland apex over the location of the Ashland claim. To do this it would have to show when, after May 10th, 1872, it acquired this additional vein, and that this was prior to the location of the Ashland claim. No attempt to make this proof is disclosed by the record. The only evidence of existence of boundaries of the Grizzly claim now asserted to include a portion of the Ashland apex, is a survey of that claim made in 1874, manifestly long after the location *and about the time of the entry of the Ashland claim.*" In making this statement our learned

friends must have overlooked the testimony of their own witnesses. For instance, Mr. Jessen, a witness for petitioners, testified as follows, Record, page 146: Q.—What corners of the Grizzly did you go to? A.—I went to that. * * * * Q.—That claim was surveyed for patent only a few years ago. A.—In 1873. Q.—The Grizzly? A.—Yes, sir. And at page 141 it appears from the testimony of the same witness that the exact date of this survey was May 14, 1873. Now, it appears from the Ashland patent, found in Supplement to Record, entitled, "Stipulation and Exhibit," pages 3 to 8, that that claim was not patented until the 27th day of September, 1875, and that final entry thereof was not made until the 6th day of May, 1875, practically two years after the Grizzly was surveyed for patent. There is no evidence as to when the Ashland was located. Nothing, therefore, to carry the inception of title thereto back of the date of final entry. The burden was upon petitioners to show, if the fact were so, that the Ashland was located prior to the Grizzly, since it is they who are seeking extra-lateral rights.

As to all other matters respecting the Ashland and Grizzly claims found in petitioners' reply brief, pages 67 to 75, including the map entitled, "Ashland Apex Map," we understand that we are not at liberty to make answer here, as it cannot be said perhaps to be new matter, and we will, therefore, only refer to what is found in our October brief at pages 167 to 185.

IV.

The statement in petitioners' reply brief, under subdivision 5, page 28, that a claim of extra-lateral rights may not

be made upon a combination of separately located and severally patented claims, none of which possess extra-lateral rights upon the theory that these severally located and patented claims may do so, we have never controverted.

V.

As to the statement found in petitioners' reply brief at page 35, "that the bill of complaint did not assert that while the petitioners had the apex of the ores in the Kempton and Ashland claims, they were so situated with regard to the boundaries of those claims as to confer no extra-lateral rights, and therefore the ownership was in the owner of the surface. Respondent did not allege that while petitioners had a portion of the apex of the limestone lode, this portion was so situated with reference to the boundaries of the claims that no apex rights existed therein, and therefore there was no apex title in the petitioners to the ore bodies in question, and for that reason they fell to the ownership of the surface." We reply that it was wholly unnecessary that the bill should contain any such allegations. Without them respondent was at liberty to show that the facts were so in rebuttal of the case attempted to be made by the petitioners in support of their claim of extra-lateral rights.

VI.

At page 59 of the reply brief it is said: "Mr. Palmer, a witness for the respondent, and a witness of adroitness and experience, gave it as his opinion that the stope near 703 was ore which had broken out from the fissure—that is to say,

from the Ashland fissure." Nothing of the kind is found in the testimony of Mr. Palmer as embodied in the record. Counsel probably had reference to testimony of Mr. Tyler, found at page 435, where he says that he found ore in the neighborhood of station 971 (a station found on respondent's map, exhibit "T," very near to the point where station 703 is found on petitioners' map, exhibit 21, and adds: "There is ore in a *bedded vein* breaking out from the main fissure, and there appears to be a displacement as I say of eight or nine feet *in the bedded vein*, one side being back of the other, that is, the west side lying further south than the east; a continuation of the same. Q.—Does that show a displacement of the ore itself? A.—That shows a displacement of the ore veins." This testimony not only lends no support to the point to which it is cited by our opponents, on the contrary it shows that the ore there referred to does not belong to the Ashland fissure, but to the bedded vein, and that it was faulted by the Ashland fissure.

At page 91 of the reply brief, in the discussion of the cross-section D-D, it is said that the limestone shown thereon is carried to the surface upon a dip which is ten degrees less than the dip given *here* by respondent's witnesses, and reference is made to testimony of Mr. Palmer (Record, 415-425), and of Mr. Tyler (Record page 436, 440). Reference to the testimony of Mr. Palmer, as found on pages referred to, will disclose that he does not undertake to give the dip of the limestone on the plane of this section, but gives the dip of the ore body and of the quartzite and limestone at a place between the Coolidge stope and the Clark stope as being 30 or 35 degrees, where owing to a roll or fold in

the bedding of the country a synclinal and also an anticlinal fold has resulted. In other words, there is there found a pronounced local disturbance which is fully explained by the witness at pages 422 to 425, cited by petitioners.

Mr. Tyler, at page 436, referred to by petitioners, speaks of the dip of an ore body nowhere near this plane of section, but which is found in the purple drift between the west end thereof and station 961, as shown upon respondent's exhibits "R" and "C" (being the same place designated upon petitioners' map, exhibit 21, in red, and marked "West Drift," extending from station 512 to 517). And on the other page, to which counsel make reference, nothing is said about dip. Indeed no witness undertook to give the dip of the lime beds as a whole, except Mr. Holden, who gave the minimum and maximum as from 15 to 40 degrees. Every other witness who spoke of the dip at all simply gave what he found it to be at some particular place.

It is also claimed by petitioners that Mr. Holden did not reach the conclusion that the limestone was a lode until fourteen or fifteen years prior to the trial. This is a mistake. What the witness did say was, that he formed the opinion fourteen or fifteen years ago that the Kempton and Ashland were on this lode. (Record page 252.)

Again, much is said in the reply brief at page 60, *et seq.*, about cross veins and rights thereon, with which we have no controversy beyond the fact that it is apparent that counsel misunderstands the position of respondent with respect to the claim of extra-lateral rights on the so-called Kempton bedded vein, as will appear by reference to what is found in our October brief at pages 142 to 167, where this particular question is discussed.

VII.

Petitioners' Kempton Limestone Map.

On this map petitioners have represented what they claim to be the position of the hanging and foot wall boundaries of the lime lode with reference to the Kempton claim, and show that the hanging wall traverses the Kemptom from end to end, crossing both of its end lines. On this map they have assumed that the No. 1 West Drift, as shown thereon from the southeasterly side line of the Grizzly to and beyond the line upon which their cross-section "C-C" is shown upon this same map, follows the true strike of the limestone strata. Reference to respondent's map, exhibit "S," will show that the course of this portion of the No. 1 West Drift is practically due east and west. There is also shown on this map the line through which cross-section "D-D" is projected. And they have assumed that the dip of the lime strata where cross-section "D-D" cuts the same is 30°. They make a like assumption as to the dip of the strata where the same are cut by cross-section "C-C." Now, it will also be seen by placing this limestone map side by side with respondent's exhibit "T," that at post 5, or the southwest corner of the Jordan Extension, they have placed the hanging wall of the limestone at that point about 30 feet south of where the hanging wall is represented to be at this same corner on exhibit "T;" and on the limestone map the course of the hanging wall is shown to be northeasterly to near the easterly end line of the Jordan Extension, and is pursuing a course which if continued a little further would carry it through the southearterly portion of the Jordan Extension a little to the north of the southeast corner

thereof, which as will be seen by reference to exhibit "T," would be about the northerly extremity of cut "D," colored red on exhibit "T." Now, the elevation at the northeast corner of this cut "D" is 1100 feet, as shown by the 1100-foot contour line on exhibit "T." The elevation is practically the same at surface station S–170 at the easterly edge of Cut "D." Now, they have the hanging wall represented on their limestone map as crossing the easterly end line of the Kempton somewhat south of the center thereof. Reference to exhibit "T" will show that the elevation at post No. 5, or the southeast corner of the Kempton, is 1300 feet as shown by the 1300 contour line on exhibit "T," which passes substantially through the corner. Now, with petitioners' assumption that the true strike of the strata is practically due east and west, and with their assumption of a 30° dip, and with this difference in elevation between the points referred to in cut "D" and corner No. 5 of the Kempton, which is 200 feet, the hanging wall of the limestone would be 364 feet south of where a line running due west of the northeasterly corner of cut "D," would cut a line running due north of the said corner No. 5 of the Kempton, which would place said hanging wall 65 feet due south of said corner No. 5 of the Kempton, or 180 feet south of where the hanging wall is represented to be upon the limestone map with reference to this corner. The limestone map cannot be correct. It is not founded upon any testimony, but is to a very large extent based upon assumptions only; and in this connection we call attention to what is said in the reply brief at page 19, where counsel, describing this map, say: "The limestone outcrop is given upon

this map substantially the course given to the limestone on respondent's map, exhibit "T," to the east of the northeast end line of the Kempton and up to within a distance of about 175 feet thereof, at which point it is suddenly narrowed up and lessened in width about 250 feet upon respondent's map and misses the northeasterly end line of the Kempton." Counsel fail to inform the court where in the record they find anything that warrants them in doing this.

As to where the limits of the hanging wall of the limestone are with reference to the westerly end line of the Kempton we have discussed in our original brief, and therefore may not say more upon it.

(The greater apparent width of limestone shown on respondent's exhibit "T" in the vicinity of said cut "D," is due no doubt, in part at least, to the great amount of erosion of the country in that vicinity. (See testimony of Mr. Tyler, Record page 431.)

At page 90 of the reply brief it is said: "The map (meaning the limestone map) indicates that near the westerly end line of the Kempton the strike of the limestone is parallel to line 1-8 and 2-3 of the Kempton claim. *This is the showing upon respondent's map.*" Reference to respondent's map, exhibit "T," will show that the course of the limestone near the westerly end is far from being parallel to these side lines of the Kempton.

On petitioners' map, marked "Kempton Apex Map," the apex of the so-called Kempton vein is represented as crossing the westerly end line of the claim. It also appears from said map that the course of said Kempton apex from its easterly extremity as shown thereon to a point a little

westerly of the dotted line marked Sampson fissure, is such that if continued it would cross the southerly side line of the Kempton claim running from post 2–3, but upon this map the vein is represented as bending just west of the Sampson fissure and taking thence a more northerly course. The bend occurs at a point which corresponds with the position of surface station S–329 on respondent's exhibit "T," the elevation of which as shown upon this exhibit, is 1365.2 feet. The elevation at surface station S–337 at the southwest corner of the Kempton is 1388.4 feet. The difference in elevation between these points is 23 feet. Taking *even a 30° dip* it would throw the apex of the so-called Kempton vein 39 feet south of the point of intersection of a line running due west from station S–329 and a line running due north through station S–337, or 25 feet south of the southwest corner of the Kempton.

On petitioners' cross-section "C-C" the limestone is represented as having a uniform dip of 30° down to the U. S. West Drift or U. S. Tunnel No. 1. On map No. 1, hereto annexed, are platted the Ashland Tunnel, the Ashland No. 2 Tunnel, a point on the Turnsheet Level and a point on the West Drift Kempton Tunnel, a point on the west drift from north end Ashland No. 2 Tunnel and a point on west drift from Ashland Tunnel. And the elevations of these respective points is also shown. This map is made from data furnished by petitioners' exhibit 21, and all these points are cut by the section, and it appears that the angle of dip from Turnsheet Level to west drift Kempton Tunnel is 41°18′; from west drift from Ashland No. 2 Tunnel to Turnsheet Level the dip is 25°16′, and from west drift from Ashland Tunnel to west drift from No. 2 Tunnel the dip is 23°40′,

showing that the angle of dip is decreasing constantly as we proceed from the west drift Kempton Tunnel towards the surface.

On petitioners' cross-section "D-D" the Jackson Incline is represented as having an inclination of 30° throughout, and it is claimed that it conforms throughout to the actual dip of the strata. Map 2, hereto annexed, shows the entire Jackson Incline which is cut by petitioners' Section "D-D," and which is platted accurately as the same is found in the ground. This is verified by the elevations shown at various points in the incline, which elevations are taken from respondent's map, exhibit "S." It can be readily ascertained from an inspection of this map that the Jackson Incline does not have a uniform inclination of 30° throughout its entire depth.

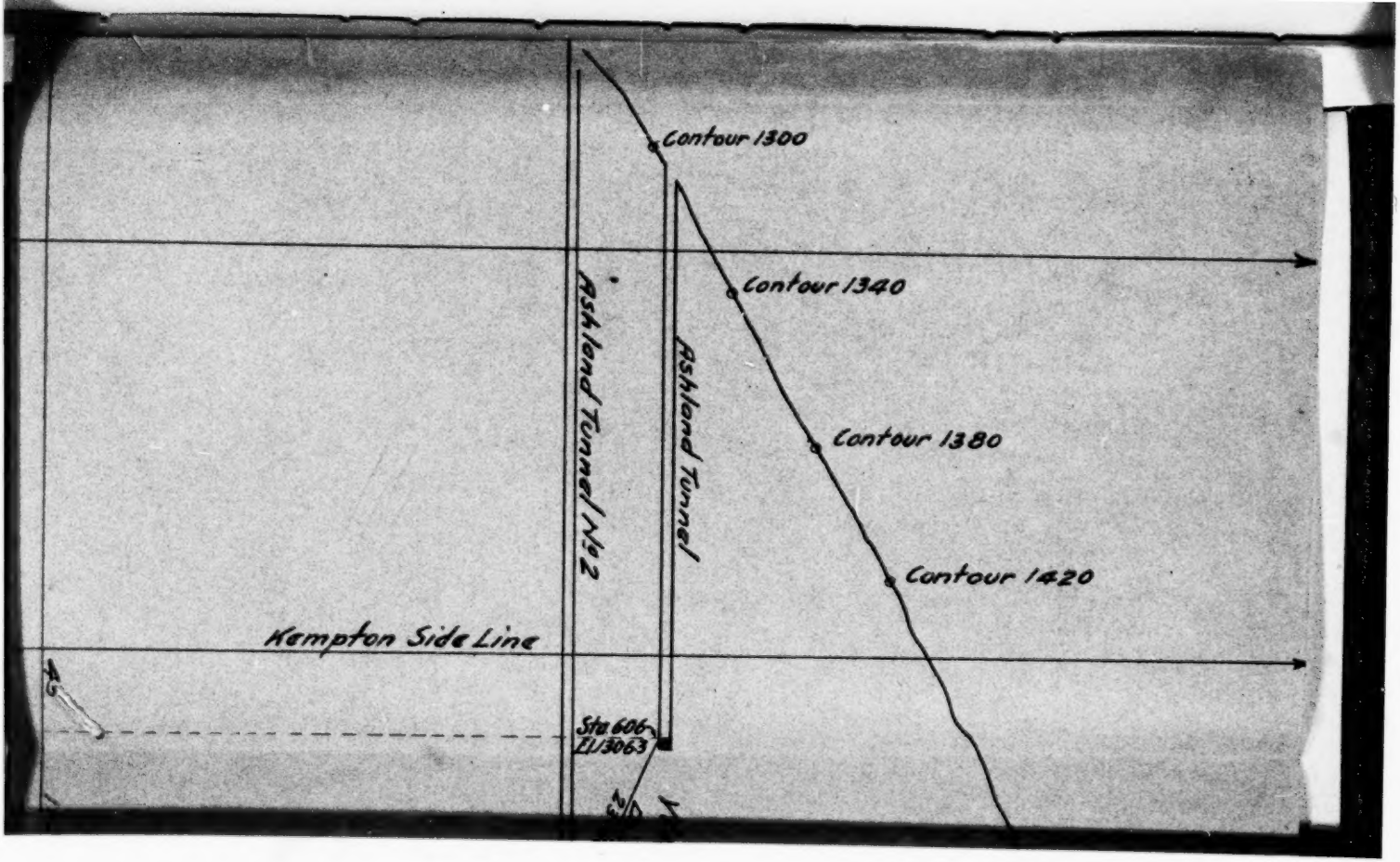
Beyond pointing out some of the errors which we claim are found on these new maps and cross-sections contained in the reply brief, we understand that we are not at liberty to discuss the question as to the dip and position of the limestone lode and its boundaries, since we have already discussed the same in our former brief.

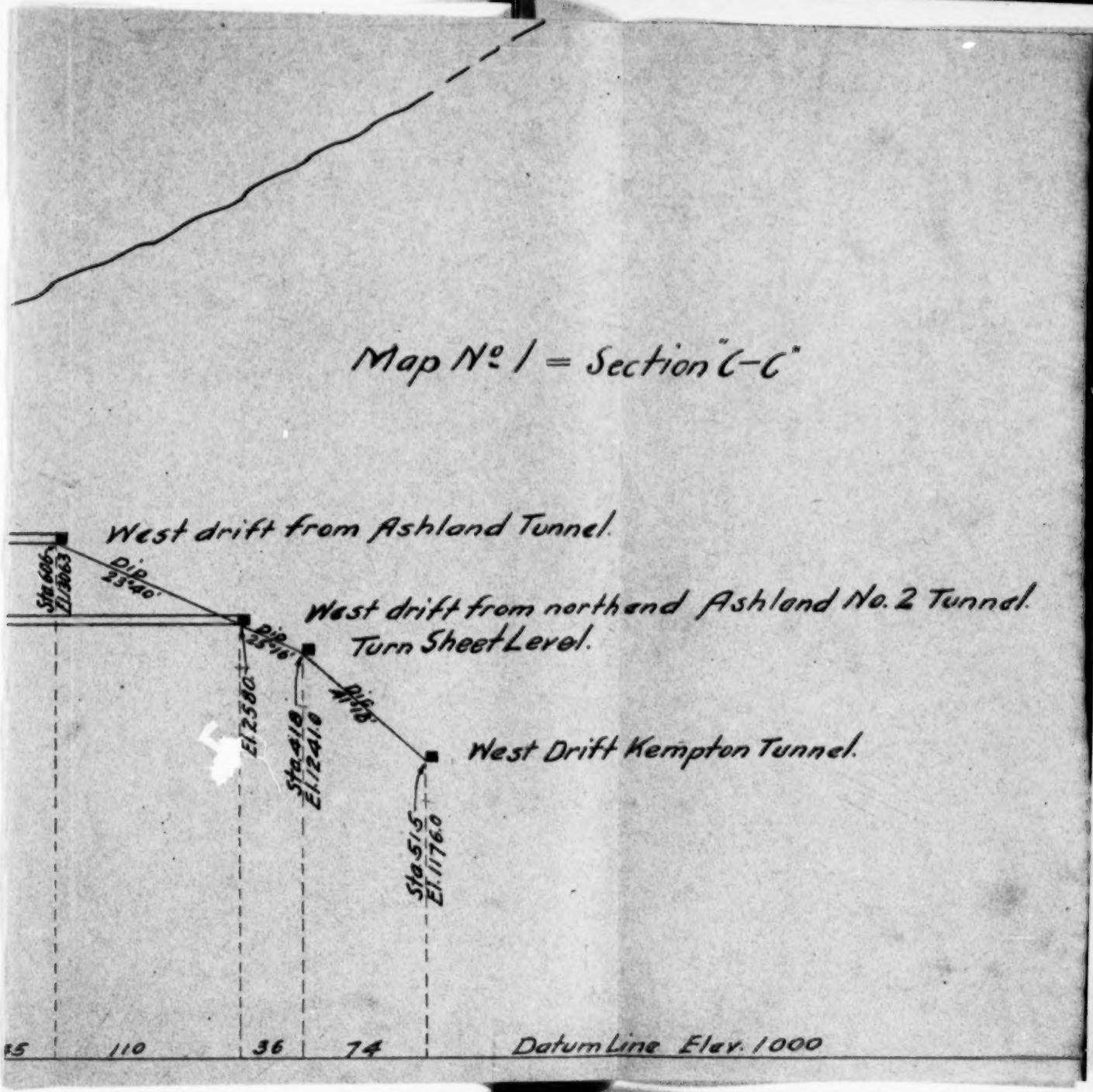
In the reply brief a number of insinuations are made as to the motives by which counsel for respondent have been actuated. We do not consider that these are worthy of or call for any comment.

Respectfully submitted,

W. H. DICKSON,
GEORGE SUTHERLAND,
Solicitors for Respondent.

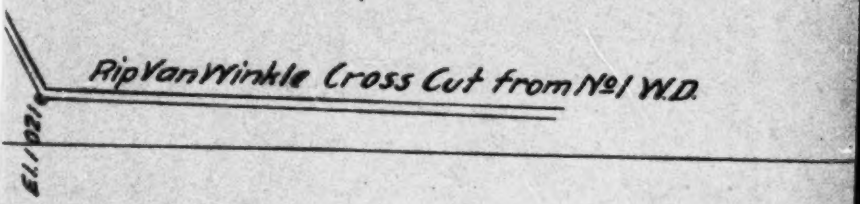
A. C. ELLIS,
A. C. ELLIS, JR.,
WALDEMAR VAN COTT,
E. M. ALLISON,
Of Counsel.


Contour 1300
Contour 1340
Contour 1380
Contour 1420
Ashland Tunnel No 2
Ashland Tunnel
Kempton Side Line
Sta 606
El 3063


Map No. 1 = Section "C-C"
West drift from Ashland Tunnel.
Sta 606
El 3063
Dip
25°40'
West drift from north end Ashland No. 2 Tunnel.
Turn Sheet Level.
Dip
25°16'
Dip
11°18'
West Drift Kempton Tunnel.
El 2580 +
Sta 4+10
El. 1241.0
Sta 5+15
El. 1176.0 +
25
110
36
74
Datum Line Elev. 1000

El.12932
El.1249
Jackson Incline
El.11995
El.11934
El.11865
El.11065
Datum Line El.1000

Map. No 2 (Section D-D)

On this sketch the entire Jackson Incline which is cut by petitioner's section "D-D" is platted accurately as the same is found in the ground. This is verified by the elevations shown at various points in the incline on Ex. "S", and which elevations are put upon this sketch.

Scale: 1 inch = 80 ft.